APPEAL COURT, HIGH COURT OF JUSTICIARY

[2019] HCJAC 15
HCA/2018/523/XC

Lord Justice Clerk
Lord Drummond Young
Lord Turnbull

OPINION OF THE COURT

delivered by LORD TURNBULL

in

APPEAL AGAINST SENTENCE

by

JOHN McKINLAY

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Dean of Faculty; A MacLeod; Faculty Services Limited
Respondent: Prentice, QC, AD; Crown Agent

12 March 2019

Background

[1] The appellant John McKinlay is 29 years old. He has a very substantial record of previous convictions. The sentence which he seeks to challenge in this appeal was the third sentence imposed on him in the High Court in a little over five years and his fourth sentence in total imposed in the High Court.

[2] On 6 February 2013 the appellant was convicted at the High Court in Glasgow of 4 charges involving domestic assault to injury and two charges of domestic assault and rape. He received an extended sentence of 8 years with a custodial element of 6 years and an extension period of 2 years. Sentence was ordered to date from 2 October 2012.

[3] Whilst serving that sentence he committed an assault to severe injury, permanent disfigurement and danger of life on a fellow inmate. On 18 November 2015, at the High Court in Edinburgh, he received a sentence of a further 4 years imprisonment in respect of that offence.

[4] On 30 May 2017, he appeared on indictment before the sheriff at Edinburgh and pled guilty to the following charge:

> "On 26 July 2016 at HMP Edinburgh [….] you did assault Paul Murray […] and did throw hot liquid onto his face and eyes, all to his severe injury and impairment"

The sheriff remitted the appellant to the High Court for sentence where the case called before Lord Uist on 22 June 2017.

[5] The circumstances of the offence were explained when the case called before the High Court. They were set out by the sentencing judge in his first report to this court at paragraph [3] in the following terms:

> "The complainer had been known to the appellant for a period of some months. There was a background of ill feeling between them arising out of an incident when they had bumped into each other, a shouting match had ensued, the complainer had threatened violence and the appellant had felt bullied and intimidated. On the day in question the complainer knocked the appellant's meal tray out of his hand. The appellant boiled water in his cell, went to the complainer's cell and threw boiling water over the complainer."

[6] Having heard submissions on the appellant's behalf, and having considered the terms of a psychiatric report prepared by Dr Perera, Lord Uist made a Risk Assessment

Order under section 210B of the Criminal Procedure (Scotland) Act 1995 for the purpose of obtaining a risk assessment report.

[7] A risk assessment report from Mr Stephen Evans, a Consultant Forensic Psychologist and Risk Management Authority accredited assessor was before the court on 7 November 2017. On that date the case was further continued, on defence motion, to enable the appellant's agents to instruct their own risk assessment report. Efforts to instruct Professor Cook and then Dr Shah were unsuccessful, as the appellant refused to co-operate with them.

[8] Various adjournments then took place over the following months until a Note of Objections to the Risk Assessment Report was allowed to be received, although out of time, on 13 April 2018 and efforts to instruct a psychiatric report on the appellant's behalf were progressed. Eventually, on 12 July 2018, an evidential hearing took place at which the court heard evidence from Mr Evans in relation to his report. That hearing was then adjourned until 28 September 2018. Prior to that hearing Mr Evans produced a supplementary report and then gave further evidence. On that same day the court also heard evidence from Dr Robert Brogan who had prepared a report on behalf of the appellant.

[9] At the conclusion of that hearing Lord Uist imposed an order for life long restriction with a punishment part of 2 years and 3 months imprisonment. It is that sentence which the appellant now seeks to challenge in the present appeal.

The Risk Assessment Report

[10] Mr Evans report was prepared in October 2017. As part of that exercise he met with the appellant in prison on a single occasion on 7 July of that year. He attempted to interview the appellant on a further four occasions in September and October of that year but the appellant refused to meet with him.

Offending history

[11] In his report Mr Evans detailed the appellant's offending history, noting that his first arrested on a charge of rape was in July 2005 when he was aged 15. In due course he appeared in the High Court in Glasgow in respect of that offence and he pled guilty to a sexual assault perpetrated against a young adult woman who suffered from learning difficulties. He received a sentence varied on appeal to a period of 12 months detention.

[12] A second period of imprisonment between May 2010 and February 2011 was noted resulting in a subsequent period at liberty between 2011 to 2012. Mr Evans noted that it was during the period of time prior to this second period of incarceration, and after his liberation therefrom, that the appellant engaged in a pattern of domestic violent conduct which resulted in his second conviction in the High Court in 2013, as referred to in paragraph [2] above.

[13] Mr Evans also detailed the appellant's history of offending and other misbehaviour within the prison environment, noting that in addition to the two serious offences for which he had been prosecuted he had accrued a further 37 reports for disciplinary infractions since entering prison in 2012. It was noted that he had spent a number of periods in the segregation and rehabilitation unit as a consequence of presenting a risk to other prisoners. The most recent was in relation to a concern about an attempt to take a hostage in 2016.

[14] In relation to the appellant's medical history, Mr Evans noted that he had extensive contact with addictions and mental health teams within the prison on at least a monthly basis. He noted that the appellant had been diagnosed as suffering from Antisocial Personality Disorder and had displayed a repeated pattern of malingering psychiatric illness in order to manipulate mental health services and, in Mr Evans opinion, there were marked

signs of paranoia and hostility which pervaded his thinking. It was said that he struggled to manage his anger, resulting in hostility to professionals, officers and other prisoners.

[15] In summary, Mr Evans concluded that the appellant displayed a diverse pattern of acquisitive violent and sexual offending.

Risk and Protective Factors

[16] A number of different methods of structured professional judgement risk assessment were employed during the preparation of Mr Evans report.

[17] The Psychopathy Checklist – Revised tool was used to assess the level of the appellant's psychopathic traits. Whilst the assessment was only partial as a consequence of the appellant's unwillingness to meet more than once, Mr Evans noted that the appellant met the diagnostic criteria for psychopathic personality disorder. Using the Risk of Sexual Violence Protocol a number of risk factors associated with future sexual violence were identified. Using the Historical Clinical Risk – 20 Version 3 nearly all of the risk factors which predicted future nonsexual violence were identified. Using the Spousal Assault Risk Assessment the appellant was placed at the 86th percentile compared to other prisoners and it was concluded that he was highly likely to engage in violence in future intimate relationships. Using the Structured Assessment of Protective Factors no protective factors could be identified which were not related to the controls placed on the appellant by the prison regime.

[18] Mr Evans noted that there was little evidence to suggest that the appellant responded to sanctions and expressed the opinion that he will continue to offend beyond the point where other offenders would reduce their offending behaviour and that he will present diverse patterns of risk. Mr Evans noted that the appellant had never taken

advantage of any opportunity for rehabilitation and appeared to lack motivation to change. Since he suffered from a psychopathic personality disorder it would be questionable whether there was any likelihood of future interventions being effective.

[19] Mr Evans concluded that the appellant was primarily a risk to adult women in the course of intimate relationships and he noted that he had caused long-standing harm to victims of sexual offences and violent offences. He expressed the opinion that if the appellant was released without undertaking treatment and further evades risk management he may quickly develop intimate relationships and return to past substance abuse. It was his opinion that in the course of such relationships the appellant was likely to exploit, assault and sexually assault his partners.

[20] In light of the assessments which he had carried out in the preparation of his report Mr Evans expressed the opinion that the appellant presented as a high risk.

The Evidential Hearing

[21] As noted above, Mr Evans gave evidence at an evidential hearing on 12 July 2018 which, as a consequence of the various delays which occurred, took place around 9 months after he had completed his report.

[22] At that hearing Mr Evans maintained the opinion which he had set out in his report and highlighted the passage at page 14 in the following terms:

> "Mr McKinley has in prior court appearances and other reviews committed to attend treatment or focus on his rehabilitation. It is significant that he has never followed through on any process of rehabilitation since a brief period he was in Kyloe House. It is clear that even then he had been involved in drug use when allowed to leave the institution. Given his lack of compliance with all prior assessments and repetition of offending patterns there is no evidence that Mr McKinley has reflected on any need to modify his behaviour and the damage he has caused."

[23] Mr Evans was referred to the report which had been prepared on the appellant's behalf by Dr Brogan dated 26 April 2018. His attention was drawn to the passages in which it was noted that the appellant had expressed great remorse and that there had been a great change in his behaviour and mental state since he had started treatment for adult ADHD.

[24] Mr Evans gave evidence that treatment for ADHD reduced one major risk factor only, namely, impulsivity. He considered that he had factored in ADHD to the risk assessment which he had undertaken and his opinion did not change in light of cross-examination about the fact that the appellant was at that time undergoing a treatment regime. In Mr Evans' opinion, treatment for ADHD would move the appellant only a fraction of a point in a positive direction. He considered there was no evidence that the appellant's patterns of behaviour had materially changed.

Continued Evidential Hearing

[25] The hearing on 12 July was adjourned by the judge at his own hand as it became obvious during the cross-examination of Mr Evans that Dr Brogan had access to material drawn from the appellant's medical records which Mr Evans had not seen. The judge requested Mr Evans to consider the appellant's medical records and his up-to-date prison records in order to be able to provide an opinion as to whether there had been a substantial change in the appellant's medical position from the time when he had been seen by Mr Evans.

[26] By the date of the continued hearing on 28 September 2018 Mr Evans had prepared a supplementary report. In that he noted that he had reviewed the medical prison records in relation to the appellant to ascertain if there had been a change in his opinion of risk. Mr Evans saw no such change.

[27] He noted in this report that whilst a number of papers concerning the use of pharmacological treatment to address symptoms of adult ADHD had been identified by Dr Brogan, no study had been cited which indicated that such treatment could reduce offending in persistent and serious violent offenders with psychopathic traits or that such treatment would impact upon sexual offences.

[28] Mr Evans noted that the prison medical records demonstrated an intermittent pattern of refusal to take the medication on numerous occasions. He considered that the appellant was not effectively engaging in the course of treatment. He considered it unlikely that the appellant could improve treatment compliance in the community.

[29] In his supplementary report Mr Evans also drew attention to information which he had been provided with from the prison authorities. He noted that upon the basis of this information there was no indication of a significant change in the appellant's behaviour and that he continued to be involved in threats and assaults on other prisoners. He noted that there were indications that the appellant had been involved in the distribution of drugs in prison. Some detail of this information was set out.

[30] Mr Evans concluded that his risk management recommendations were not changed by his review of further evidence. He expressed the opinion that:

> "The evidence points to the need to lifelong monitoring of behaviour and requirement for restrictions of liberty due to the risk Mr McKinley continues to present to others. There is no evidence of significant change in lifestyle since the first report was completed."

Evidence of Dr Brogan

[31] At that same hearing evidence was led from Dr Brogan, who spoke to the terms of his own report. He did not accept that the appellant suffered from antisocial personality disorder and considered that there were other factors in play, namely adult ADHD and

childhood abuse. He expressed the view that it was very difficult to treat adult ADHD in prison and that the appellant had been successfully treated for this condition for a period of four years when he was younger.

[32] Dr Brogan considered that the appellant was suffering from a mental disorder with the dual diagnosis of:

1. Mental and behavioural disturbances due to multiple drug use and use of other psychoactive substances and
2. Adult ADHD

Dr Brogan's opinion was that both of these disorders were major factors in the appellant's offending, that treatment for both was available and should reduce the risk of further offending.

[33] In his evidence Dr Brogan expressed the opinion that Mr Evans was wrong to say that the appellant constituted a high risk. Adult ADHD was a severe driver towards offending behaviour. He did not agree that there were no obvious protective factors in the appellant's case and expressed his opinion that treatment for ADHD would change things.

[34] He considered that it would be difficult but not impossible to manage the appellant in the community and postulated the use of a Drug Treatment and Testing Order under which the appellant could be regularly reviewed with specialist supervision and monitoring.

The sentencing judge's assessment

[35] The sentencing judge preferred the evidence given by Mr Evans over that given by Dr Brogan. He considered that Dr Brogan's approach had been superficial and had displayed a lack of objectivity. He considered that Dr Brogan's assessment was based on self-report from the appellant.

[36] He also concluded that the appellant's adult ADHD was only a small part of the whole picture which had to be considered in the assessment of risk. He drew attention to the extensive list of risk factors identified by Mr Evans and the absence of protective factors. He concluded that even if the appellant complied with treatment for adult ADHD that would not affect the risk assessment arrived at by Mr Evans which, the judge concluded, was based on sound application of the guidelines produced by the Risk Management Authority. He also rejected the contention that the appellant was in fact complying with treatment for adult ADHD.

[37] In light of the evidence led before him the sentencing judge was satisfied that the risk criteria were met in the appellant's case and he made an order for lifelong restriction.

The Note of Appeal

[38] The appellant's Note of Appeal contended that the sentencing judge had erred in determining that the risk criteria had been met. Various criticisms of the reports prepared by Mr Evans were identified:

- Since he had only met the appellant on one occasion for a period of 1½ hours the report was almost entirely based on a paper exercise.
- No mention was made in the report of the appellant continuing to suffer from adult ADHD nor of the fact that he was placed on medication for this condition in September 2017 and this fact had not been taken into account by Mr Evans in determining the appellant's level of risk.
- Mr Evans was intransigent and inflexible in his views.

- In his supplementary report Mr Evans pointed to 2 instances of a breach of prison rules which were not based on intelligence. This was a marked deterioration from previous years and this improving conduct had not been given appropriate weight.

[39] Separately, it was contended that the sentencing judge had no basis for arriving at the views which he did in relation to Dr Brogan's evidence and that he failed to give proper weight to the evidence of Dr Brogan concerning the change in the appellant's circumstances since the initial report by Mr Evans had been prepared.

Submissions for the appellant

[40] The points listed in the Note of Appeal were amplified in the written case and argument lodged on behalf of the appellant and were addressed by the Dean of Faculty who appeared on the appellant's behalf, as he had at the evidential hearings. It was submitted that the report prepared by Mr Evans was flawed since the appellant had only recently been diagnosed with adult ADHD and the exercise which he undertook took little or no account of this. It was wrong to look at the circumstances of someone with ADHD and then to focus so much on that person's past behaviour, as Mr Evans had done. No account was taken of the progress which had been made after the appellant had commenced a programme of medication. Despite having no appropriate expertise in the use of medication to treat ADHD, Dr Evans was prepared to dismiss the impact of the treatment programme.

[41] A separate issue arose in relation to the supplementary report prepared by Mr Evans. At page 3 Mr Evans provided information concerning the appellant's behaviour whilst in custody in the last year. He noted that he had reviewed records of the appellant's behaviour in prison including intelligence gathered from prison officers. He then set out information concerning incidents said to have occurred on 31 August 2017, 23 December 2017, 17 April

2018 and 30 June 2018. It was submitted that in so doing the supplementary report failed to comply with the requirements of section 210C(c) of the 1995 Act, which requires the assessor to explain the extent to which any allegation that the person is engaged in criminal behaviour, and any evidence supporting that allegation, has influenced the opinion included in his report. Accordingly, it was submitted, those acting for the appellant had no way of knowing from Mr Evans report the extent to which his view may have been influenced by these intelligence reports. In all of these circumstances it could be contended that the trial judge had given undue weight to the evidence given by this witness.

[42] The Dean of Faculty submitted that the risk criteria provided for by section 210E of the 1995 Act set a high bar for the imposition of an order for lifelong restriction. The particular risk referred to is that of seriously endangering the lives, or the physical or psychological well-being, of members of the public. Three elements were important in addressing that risk; first, the likelihood of offences that seriously endanger the public occurring; secondly, the probable seriousness of those offences; and thirdly the time at which the existence of the risk criteria must be considered. The imposition of an order for lifelong restriction was only appropriate in relation to those who could be regarded as exceptional offenders and ought not to be imposed simply because of the offenders recidivist history. Experience shows that with or without assistance many young male offenders grow away from their criminal behaviour. In advancing these submissions the Dean of Faculty relied on what had been said in *Ferguson* v *HM Advocate* 2014 SCCR 244 at paragraphs 129 and 137. Insufficient weight had been given to the availability of alternative methods of managing the risk posed by the appellant and it was observed that he had never been supervised under an extended sentence regime in the community.

[43] The Dean of Faculty also submitted that the criticisms of the evidence given by Mr Evans which he had identified, and the contention that the trial judge had given undue weight to his evidence, required to be seen alongside the important circumstance that the offence for which the appellant fell to be sentenced was an offence committed in custody. In this respect it was of limited value in in determining the likelihood of his committing further offences or further violent offences when at liberty. He submitted that the present offence could not operate as a gateway to the imposition of an order for lifelong restriction if it did not meet the test of danger to the public at large. In advancing the submission the Dean referred to the case of *Kinloch* v *HM Advocate* 2016 SCCR 25 and in particular to what had been said by the Lord Justice Clerk (Carloway) in giving the opinion of the court at paragraph [27].

Submissions for the respondent

[44] The advocate depute submitted that the case of *Kinloch* was one which applied to its own very special circumstances. As could be seen from paragraph [4] of the report, the offending behaviour had been motivated by a desire on the part of those appellants to be transferred to a prison in the west of Scotland. The conduct engaged in by the appellants in that case was very focused in its purpose.

[45] In the present case the circumstances of the appellant's offending behaviour were set out by the sentencing judge in paragraph [3] of his first report. The sentencing judge had relied upon the evidence of Mr Evans, as he had been entitled to do, and the risk criteria were established.

Discussion

[46] We are unable to give effect to the criticisms of the evidence which were advanced

on behalf of the appellant. Mr Evans is an experienced Chartered Forensic Psychologist who has been accredited by the Risk Management Authority as an Accredited Risk Assessor since 2008. He has completed more than 10 prior assessments of offenders under a Risk Assessment Order. Although he only met with the appellant on one occasion, he spent one and a half hours with him during the course of which he was able to gain an understanding of the appellant's family and life history. He had access to details of the appellant's family and offending history. He was able to utilise a number of different accredited risk assessment tools and, applying such standards and guidelines as are issued by the Risk Management authority, he was in a position to form an opinion as to what risk the appellant being at liberty presented to the safety of the public at large and to categorise that as a high risk, all in compliance with the duty imposed on him by section 210C (3) of the 1995 Act.

[47] In his evidence on 12 July Mr Evans was cross-examined about the impact of ADHD on risk assessment. His evidence was that he had factored in ADHD to his risk assessment. He was aware that the appellant had received treatment for ADHD as a child. He was not persuaded to move from his assessment even if the appellant's ADHD were treated. His evidence was that treatment for ADHD would move the appellant only a fraction of a point in a positive direction. On the basis of the information which he had at that time he did not consider that treatment would lead to a significant change in the appellant's circumstances. Treatment for ADHD reduced one major risk factor only, namely, impulsivity. The sexual offences and the offences in prison of which the appellant had been convicted were not impulsive in nature. The appellant had a pattern of reneging on programs and treatment and his levels of psychopathic traits were strongly predictive of future offending. All of this evidence was accepted by the sentencing judge.

[48] At the adjourned hearing on 28 September Mr Evans confirmed that despite his assessment of the appellant's up to date medical and prison records his opinion had not changed from high risk. The appellant had fairly consistently refused to take his medication and a greater compliance with treatment was to be expected from someone in a prison setting than from someone in the community. He testified that he had taken account of reliable intelligence from prison officers and overall his opinion was that there had been no particular change in the appellant's behaviour. Again, all of this evidence was accepted by the sentencing judge.

[49] The question of what evidence to accept and what weight to attach to any evidence accepted was a matter for the judge who presided at the evidential hearings. He was entitled to be satisfied that Mr Evans was suitably qualified to perform the task of risk assessment and to be satisfied that he undertook that task in a professional and competent manner. Insofar as there may have been a question over the impact of a diagnosis of adult ADHD, the sentencing judge was entitled to conclude, as he did, that Mr Evans had arrived at a fully informed view by the date of the adjourned hearing. In particular, he was entitled to accept Mr Evans' evidence that adult ADHD comprised only a small part of the whole picture to be considered in the assessment of risk.

[50] Insofar as it may be thought that there was a technical deficiency in the content of the supplementary report prepared by Mr Evans, it was said that there was not an adequate explanation of the extent to which the intelligence information mentioned influenced the opinion which he arrived at, any such deficiency was capable of being explored, as it was, and remedied in oral testimony.

[51] The sentencing judge was also entitled to reject the competing evidence given by Dr Brogan. He gave his reasons for doing so and these were not undermined in submissions

on behalf of the appellant. When he came to consider whether the evidence persuaded him that the risk criteria had been established, the judge had a clear and reasoned view available to him from Mr Evans. Although Dr Brogan's evidence was to a different effect, it is worthy of note that, neither in his report nor in his testimony, did Dr Brogan offer his own professional view as to the level of risk which the appellant posed nor, it would seem, as to what protective factors he saw as being present. It is also to be noted that the report prepared by Dr Brogan was described as a "Psychiatric Report". It did not claim to be in the nature of a risk assessment report for the purposes of section 210B (3) of the 1995 Act and Dr Brogan did not claim to be accredited by the Risk Management Authority.

[52] Having heard the evidence and submissions from the parties, the question for the sentencing judge was whether he was satisfied on a balance of probabilities that the risk criteria were met. In terms of section 210E of the 1995 Act the risk criteria, read shortly, are that the:

> "nature … or the circumstances of … the offence … either in themselves or as part of a pattern of behaviour are such … that there is a likelihood that the offender if at liberty, will seriously endanger the … the public …".

[53] The evidence accepted was that the risk the appellant being at liberty presented to the safety of the public was high. By definition that meant that the nature, seriousness and pattern of the appellant's behaviour indicated an enduring propensity to seriously endanger the lives or physical or psychological well-being of the public at large (Appendix 7 of first report by Mr Evans). In Mr Evans' report, which he confirmed in evidence, he explained that he arrived at the conclusion that the appellant presents a high risk for the following reasons:

- There is a pattern of offending that emerged in childhood and has continued to the present day.

- There are no significant protective factors and Mr McKinlay has continued to offend in conditions of high security.
- There are no records of any significant engagement with approaches to address his offending in prison or in the community.
- The patterns of offending include repeated sexual offences and violent offences. Sexual offences have caused the victims significant and enduring psychological harm, violent offences have left injuries that have required hospital treatment and reconstructive treatment.
- Mr McKinlay meets the diagnostic criteria for Psychopathic Personality Disorder indicating he is: likely to have lifelong patterns of offending, less likely to respond to rehabilitation efforts, lacks the emotional and moral attributes that prevent those without this disorder from offending.

[54] It is for the court to determine whether there is a likelihood that an offender will seriously endanger the public. That is a question of fact, the answer to which will depend upon a consideration of the particular offence and any pattern of individual behaviour. Judicial experience will play an important part in this determination, but the court must have specific regard to the terms of the Risk Assessment and "any other information" (s.210F(1)) before arriving at a conclusion - *Ferguson* v *HM Advocate* 2014 SCCR 244 Lord Justice Clerk (Carloway) at para [92]. The question of whether there is a likelihood of serious endangerment must stem from the nature or circumstances of the commission of the offence or from a pattern of behaviour of which the behaviour forms a part – *Kinloch* v *HM Advocate* 2016 SCCR 25 Lord Justice Clerk (Carloway) at paragraph [25].

[55] Unlike the circumstances in the case of *Kinloch,* the offending for which the appellant fell to be sentenced, the "gateway offence" as it was called, did fit into a pattern of behaviour

within the scope of the risk criteria. As noted by Mr Evans in the concluding paragraph of his report at page 23, the appellant has a pattern of violent offending against intimate partners, fellow prisoners and members of the public. He has a pattern of sexual offending against adult women in intimate relationships and has repeated these offences when he has been at liberty. He has long-standing patterns of substance abuse and his lifestyle has been dominated by a need to maintain a hedonic tone, he has attempted to continue this inside prison. He has been at liberty for less than four years in the last 10 years and has continued to offend inside prison. Substantial risk factors associated with both future sexual violence and future nonsexual violence were identified in the use of the relevant risk assessment tools (first report pages 16 and 17). The offences which the appellant committed in prison were noted as being similar to the domestic assaults perpetrated by the appellant in that the victims appeared to be seen by the appellant as criticising him (first report page 10).

[56] In all these circumstances we are entirely satisfied that the sentencing judge was correct in arriving at the view that the risk criteria were met in the appellant's case and in concluding that an order for lifelong restriction ought to be imposed. The appeal is therefore refused.