



APPEAL COURT, HIGH COURT OF JUSTICIARY

[2019] HCJAC 47
HCA/2018/579/XC and
HCA/2019/213/XC

Lord Justice General
Lord Menzies
Lord Brodie

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in

APPEALS AGAINST SENTENCE

by

DANIEL KINLAN and DARREN BOLAND

Appellants

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant (Kinlan): AJ Macleod, Shand; Paterson Bell (for MM Grady, Glasgow)

Appellant (Boland): KD Stewart QC; Paterson Bell (for KM Law, Glasgow)

Respondent: Farquharson QC AD; the Crown Agent

11 July 2019

Introduction

[1] This appeal concerns the appropriate level of punishment part when sentencing young persons who have been convicted of murder. It is worth emphasising at the outset that, as with all decisions which fix punishment parts in murder cases, the sentence of the

court is detention or imprisonment for life. The punishment part sets a period which the court considers will satisfy the requirement, in the sentencing equation, for retribution and deterrence. The court is directed by Parliament “to ignore any period of confinement which may be necessary for the protection of the public” (Prisoners and Criminal Proceedings (Scotland) Act 1993, s 2(2) and (2A)). The determination of the punishment part does not constitute a recommendation or suggestion by the court that the offender ought to be released upon the expiry of the punishment part. It simply establishes a period during which the offender cannot apply for parole. Thereafter, he may only be released if the Parole Board “is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined” (*ibid* s 2(5)). Even if he is released on parole, he will remain on licence, and subject to any conditions which may be deemed appropriate, indefinitely.

Background

[2] On 23 November 2015, the appellants both pled guilty to the attempted murder of Adekunle Tella on 1 August 2015 by, amongst other things, repeatedly punching him on the head and body, knocking him to the ground, rendering him unconscious and thereafter repeatedly kicking, stamping and jumping on his head to his severe injury, permanent disfigurement, permanent impairment and the danger of his life. On 7 January 2016, Mr Kinlan was made the subject of an extended sentence of 11 years 9 months, with 6 years and 9 months as the custodial element. Mr Boland was given an equivalent sentence of 10 years with 6 years custodial. Both sentences had been subject to a 25% discount for a guilty plea at a Preliminary Hearing. Mr Boland was sentenced to three 3 month concurrent terms for bail aggravations consecutive to the principal term.

[3] On 7 December 2016, Mr Tella died. On 19 September 2018, both appellants were convicted of murder in terms of a similar libel. A joint minute had agreed that the appellants had behaved in the manner libelled and had previously pled guilty to attempted murder. The issue at trial had been the cause of death, although at no point had Mr Tella fully regained consciousness. He had ultimately succumbed to pneumonia, being vulnerable to infection because of his lowered state of consciousness, immobility and tube feeding. On 26 October 2018, both appellants were sentenced to detention for life. Mr Kinlan's punishment part was set at 10 years 9 months. This took, as a starting point, a punishment part of 14 years, which was reduced by 3 years and 3 months to take into account the period spent in custody. Mr Boland's punishment part was 9 years and 11 months. This was calculated on the basis of a 13 year punishment part, reduced by 3 years and 1 month. There was no discount in either case, given that there was no plea of guilty to the murder charge and hence, it was said, no utilitarian benefit to the court. Leave to appeal the decision not to afford the appellants a discount was refused at first and second sift.

Facts

[4] On 31 July 2015, at about 9.30pm, Mr Tella had left his flat in a block in Springburn to attend a night-time vigil at the Redeem Christian Church. At about 2.30am, on 1 August, he was making his way back home when he was assaulted outside his block. The appellants, who were aged 15 at the time, had both been out with a group of other teenagers, who were all aged between 15 and 16. By 2.30am some of the group had gone home, but three boys and two girls remained. Mr Kinlan had been drinking Frosty Jack cider. He may have taken drugs. He was intoxicated. The group had tried unsuccessfully to gain entry to the block.

Having failed to do so, the appellants, and one of the girls, had left the entrance foyer and walked down a set of steps into the car park. At the same time, Mr Tella had approached on his return home. He stood aside to let the three pass. As they did so, Mr Boland grabbed Mr Tella's hat. Mr Tella tried to get it back, without success.

[5] Mr Kinlan threw a plastic bottle at Mr Tella, striking him on the chest. Mr Tella shouted on the concierge for help. There was no one in the concierge station, although events were being monitored from a neighbouring block. CCTV images captured the events which followed. Mr Kinlan pushed Mr Tella. Both appellants repeatedly punched him on the head and body. A punch from Mr Boland caused Mr Tella to fall to the ground and land against a temporary security fence. He did not move, once he had struck the ground. He was unable to defend himself from the assault, which the trial judge correctly describes as brutal, which ensued. Both appellants kicked Mr Tella's head two or three times. Mr Kinlan stamped on and kicked his head, as he lay prone, approximately twenty times. Mr Boland tried to pull Mr Kinlan away and eventually succeeded. Both then ran away.

[6] An ambulance was called. Mr Tella was unresponsive to voice. He was taken to Glasgow Royal Infirmary in a state of unconsciousness. He remained there for several weeks, making slow progress. He could not follow commands and there was no obvious sign that he could understand the medical team. He was transferred to a care home for a number of months. It was during this period that the pleas of guilty to attempted murder were tendered. At that time, it was estimated that there was a negligible chance of a full recovery. It was likely that Mr Tella would remain severely disabled for life. He was admitted to hospital several times, suffering from infections. He was eventually moved to another nursing home, where he stayed for a matter of weeks before he died.

[7] Mr Kinlan was detained at 6.30pm on 1 August 2015. At interview he continually smirked and laughed. He answered “no comment” to all questions. The Criminal Justice Social Work Report recorded him as saying that he could not remember the events, as he had taken both alcohol and drugs. Mr Boland was interviewed at about 10.14am and made no comment. The CJSWR stated that he maintained that he had had a lot to drink at the material time and had also taken ecstasy, although this conflicted with an earlier account that he had not taken any drugs.

Personal circumstances

[8] Mr Kinlan is an only child. At first he lived with his mother and father until they separated when he was about 8 years old. He apparently had a “happy” early childhood. Neither of his parents had any significant criminal history. Mr Kinlan’s progress at primary school was described in the CJSWR as unremarkable. It also records that he was excluded for fighting and displaying “nuisance behaviours”. He had low concentration and was easily distracted. His behaviour deteriorated rapidly in his second year at secondary school. There were regular suspensions for fighting, abuse towards teachers and destructive behaviour. Attempts to assist him through a reduced timetable and weekly counselling involving anger management did not succeed. He was permanently excluded after throwing a glass jar at a teacher. Further attempts to put Mr Kinlan back on course had also failed. These included referral to an enhanced vocational inclusion programme, which offered a college based alternative to school. Mr Kinlan was asked to leave after 3 hours because of his threatening behaviour. A further referral about a year later foundered because he had been “under the influence” at interview.

[9] The CJSWR records that Mr Kinlan was diagnosed as suffering from Attention Deficit Hyperactivity Disorder in January 2015. He was prescribed medication, but reported that he did not like the side effects of this. He may have been taking it sporadically. He had started drinking alcohol excessively several times a week. He was smoking cannabis daily and regularly using other drugs such as MDMA, LSD, Ecstasy and Valium. According to the CJSWR, although Mr Kinlan had expressed some acknowledgement of the effect of his conduct on his own and Mr Tella's family, he did not display any level of empathy with Mr Tella. He maintained that he could remember nothing about the incident. Since being in custody, he had engaged well in full-time education. He had gained qualifications in geography and modern studies. In the Young Offenders Institute in Polmont, he had completed a joinery course. He had become a "pass man".

[10] Mr Kinlan's agents had obtained a clinical psychology report from Dr Jennifer McDonald dated 28 December 2015. This had not been produced in the trial process. Counsel said that he had simply forgotten about it at the time of sentencing. The purpose of the report was to explore the effects of the ADHD, which was described as "a persistent pattern of inattention and/or hyperactivity-impulsivity that interferes with functioning or development". Amongst other effects, he was prone to acting upon impulse and struggled with self-control. He was easily "overwhelmed". There is no cure for ADHD, although symptoms may improve with age. It is a known risk factor for general and violent offending, although it does not cause violence. It produces symptoms which may increase a person's tendency to commit serious violence. Mr Kinlan's IQ was assessed at 74, being between the borderline range and the 4th percentile. His reasoning is much poorer than would be expected for his age. His ADHD is likely to continue to impair his functioning. Dr McDonald did not express a view on how ADHD might interact with alcohol or drug

use. Mr Kinlan had already come to the attention of the police in April 2014. He was referred to the Children's Hearing on 14 charges, including threatening behaviour, assault, police assault, vandalism, dishonesty, consuming alcohol in a public place, weapon use and fire-raising.

[11] Mr Boland is the eldest of four children. He was brought up by his mother and had no contact with the paternal side of his family. His mother had remarried and he had thereafter lived with his mother and step-father and siblings. His progress at primary school was unremarkable. At secondary school, he was suspended for swearing at a teacher. He left without full qualifications. He was thought to have some academic ability, but not a good attitude. He was subject to peer group pressure. He had come to the attention of social work services in December 2014, having been referred by the police for shoplifting and carrying offensive weapons. He was regarded as outwith parental control. He had key issues concerning cannabis, alcohol misuse and anger management. He had been helped to secure a place on a painting and decorating course. At the time of his remand, he was due to start a construction course at Glasgow Kelvin College. His period in custody had resulted in 20 misconduct reports, including three for assault. He had completed the Youth Justice Programme.

The judge's reasoning

[12] In determining the punishment parts, the trial judge took into account the best interests of the appellants, who were both 15 at the material time and respectively 18 and 19 at the time of sentencing. She noted that neither appellant's personality would have been fully formed at the time of the attack. She considered that lengthy periods should be imposed as punishment and deterrence. In Mr Kinlan's case, he had kicked and stamped on

Mr Tella's head more than 20 times; persisting after Mr Boland had stopped. The judge took into account the need for rehabilitation and re-integration of the appellants into society.

Submissions

[13] The submission on behalf of each appellant was that the punishment parts were excessive. As they had not been back-dated, they were the equivalent of 14 and 13 years. Inadequate weight had been placed on the age of the appellants (see *McCormick v HM Advocate* 2016 SCCR 308, citing *R (Smith) v Secretary of State for the Home Department* [2006] 1 AC 159) and the desirability of re-integrating them into society.

[14] On behalf of Mr Kinlan, Dr McDonald's report was heavily founded upon, notwithstanding that it had not been shown to the trial judge. Although Mr Kinlan had said that he could not recall the circumstances of the offence, because of his ingestion of alcohol and drugs, he had accepted responsibility upon viewing the CCTV images. There had been no pre-planning or the use of weapons. Mr Kinlan's ADHD may have had some impact. Mr Kinlan, it was said, had expressed remorse. He had a supportive family.

[15] For Mr Boland, it was accepted that he had acted in concert. He had not been the "major attacker" and had tried to drag Mr Kinlan away. There was no pre-planning or the use of weapons. Mr Boland had accepted responsibility for the attack. He would be going into a penal institution as an adolescent. He would emerge as a man. There was a basis for hope upon maturity.

Decision

[16] *HM Advocate v Boyle* 2010 JC 66 disapproved (LJG (Hamilton), delivering the opinion of the Full Bench, at para [14]) of the idea, derived from *Walker v HM Advocate* 2002 SCCR

1036 (at para [8]) that a punishment part of 12 years should be the norm for “most cases of murder”. At least when the murder had been committed by stabbing, and the perpetrator had deliberately armed himself, a starting point:

“of a significantly longer period of years [would be justified]. A punishment part as low as 12 years would not be appropriate unless there were strong mitigatory circumstances, and a punishment part of less than 12 years should not be set in the absence of exceptional circumstances (eg where the offender is a child)”.

Boyle set (at para [16]) the norm at 16 years for offences involving the carrying of knives in public, but contemplated a period of less than 12 years even in those cases where the offender was a child.

[17] It is striking that, after *Boyle*, the level of punishment parts has increased substantially. For murders involving repeated stamping, periods in excess of 16 years have been deemed appropriate (see eg *Laurie v HM Advocate* [2019] HCJAC 13; cf *Bruce v HM Advocate* [2016] HCJAC 25). No doubt each case will turn on its own facts and circumstances, but it is nevertheless instructive to revisit *Boyle* in order to understand the reasoning of the Full Bench.

[18] As the trial judge duly recognised and took into account, the sentencing of young offenders involves additional considerations from those applied when dealing with adults. The first is that the court must have regard to the best interests of the child as a primary consideration (*McCormick v HM Advocate* 2016 SCCR 308, LJC (Dorrian), delivering the opinion of the court, at para [4], citing *Hibbard v HM Advocate* 2011 JC 149, Lord Carloway, delivering the opinion of the court, under reference to Article 3(1) of the UN Convention on the Rights of the Child (1989)) and to the desirability of the child’s reintegration into society (*ibid*, citing *Greig v HM Advocate* 2013 JC 115, Lord Carloway, delivering the opinion of the court, at para [9], referring to Art 40 of the UN Convention). In *R (Smith) v Secretary of State*

for the Home Department [2006] 1 AC 159, Lady Hale adopted the three reasons for treating juveniles differently from adults which had been described by the US Supreme Court in *Roper v Simmons* (2005) 543 US 551 (Kennedy J, delivering the opinion of the majority):

“First ... [a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions (*Johnson v Texas* (1993) 509 US 350 at 367) ... [J]uveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure ... [They] have less control or less experience with control, over their own environment ... The third broad difference is that the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed”.

As Lady Hale put it in *R (Smith)*:

“24. ... the first of these meant that a juvenile’s irresponsible conduct was not as morally reprehensible as that of an adult; the second meant that juveniles had a greater claim to be forgiven for failing to escape the negative influences around them; and the third meant that even the most heinous crime was not necessarily evidence of an irretrievable depraved character ...

25. These considerations are relevant to the retributive and deterrent aspects of sentencing, in that they indicate that the great majority of juveniles are less blameworthy and more worthy of forgiveness than adult offenders. [T]hey also show that an important aim ... of any sentence imposed should be to promote the process of maturation, the development of a sense of responsibility, and the growth of a healthy adult personality and identity”.

[19] The sentence must be fair and proportionate, in line with the guideline, which has been approved by the court, on the “Principles and purposes of sentencing”. It must in addition take account of the young offender’s lack of maturity, capacity for change and the offender’s best interests. Rehabilitation is an important consideration.

[20] There are no mitigating circumstances relative to the offence itself. The attack on Mr Tella was entirely unprovoked. It was brutal and, especially given his early incapacitation, cowardly. The only mitigation is derived from the appellants’ youth and their acceptance of responsibility for the attack. These matters were all taken into account

by the trial judge. Although Dr McDonald's detailed analysis of ADHD was not put before her, the fact that Mr Kinlan suffered from that condition was referred to in the CJSWR. The extent to which it played any part in Mr Kinlan's conduct, having regard to his consumption of drink and drugs, is unclear. What is apparent is that it was his persistence in stamping on Mr Tella's head that characterised the assault as particularly brutal. The judge was entitled to distinguish between the appellants on that basis.

[21] In all the circumstances, and having regard to the *dicta* in *Boyle (supra)*, the starting points for the assessment of the punishment parts at 14 and 13 years can be seen as excessive. The court will take as its starting points 12 and 11 years. This will result in punishment parts, which will run from the date of the trial judge's sentences, of 8 years and 9 months for Mr Kinlan and 7 years and 11 months for Mr Boland. The appeals are allowed accordingly.