APPEAL COURT, HIGH COURT OF JUSTICIARY

[2023] HCJAC 10
HCA/2023/048/XC

Lord Justice Clerk
Lord Woolman
Lord Matthews

STATEMENT OF REASONS

issued by LADY DORRIAN, the LORD JUSTICE CLERK

in

CROWN APPEAL AGAINST SENTENCE

by

HIS MAJESTY'S ADVOCATE

Appellant

against

ANDREW PALFREMAN

Respondent

Appellant: R Charteris KC, Solicitor General for Scotland; the Crown Agent
Respondent: I Paterson (sol adv); Corrigan Law, Glasgow

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6 April 2023

Introduction

[1] This is a Crown appeal against a life sentence for murder by stabbing with a punishment part of 12 years.

Background

[2] The respondent was convicted of murdering Barry McLachlan by striking him on the head and body, and repeatedly striking him on the head and body with a knife. The two men were friends and had spent the day of the murder in each other's company, mainly at the home of the respondent. It seems that they both consumed alcohol and drugs. Neighbours heard the sounds of arguing and fighting during the course of the evening. From about 11 pm and into the early hours of the morning the respondent sent messages to various individuals in these terms:

- "brother yer no gawny hear fae is again just prodded fuck oot a cunt in ma gaff n hes deed oot the close man"
- "just done cunt oot ma close"
- "just stabbed fuck oot a guy n hes lyin hawf deed in my close"
- "cunts fucked man, dafty anaw"
- "answer ma call or yer no gawny hear fae is again just done a cunt"

Some of these messages were accompanied by images of the deceased's body, and laughing emojis.

[3] The respondent eventually called the emergency services just before 4am. He stated he had stabbed the deceased when fighting with him. He stated, "I completely freaked out ... just sort of self-defence." He acknowledged that the body had been lying for some time and that he had disposed of the knife. He added that he suffered from serious mental health problems, and referred to a "dark passenger" and "Mr Dark Side".

[4] When police arrived the stairwell was slippery with blood, and the body of the deceased was on the landing outside the respondent's flat. After being cautioned, the respondent stated "I did it. I stabbed him. I didn't mean it". He said that the deceased had

shouted at a dog which the deceased was looking after, and this had led to a fight. He made numerous statements to police, and told officers that he had heard the deceased crying out for help. The respondent had gone to bed hoping when he woke up it would not have happened. He continued to assert that he had acted in self-defence and that the deceased had been the aggressor, and had been nasty to the dog. The police recovered the knife from the back garden where the respondent told them he had put it.

[5] The respondent's account was not entirely consistent, saying at once that he had presented the knife to scare the deceased, and to protect himself, and had blacked out after that, yet also saying that he had "stuck it into him". The jury, having heard that there were 6 stab wounds from 7 blows, 2 of which could not be survived, clearly rejected his claims of self-defence and provocation, both of which had been advanced at trial.

Sentence

[6] The judge approached the length of the punishment part in three stages. First, he had regard to the five judge decision in *HMA* v *Boyle* 2010 JC 66. It suggested that a starting point of 16 years was appropriate where an accused had armed himself with a knife with a view to assaulting his victim. Secondly, the trial judge reduced that figure by one year, because he thought that the respondent had acted impulsively by using a knife when the quarrel moved into the kitchen. In doing so, the trial judge had regard to the subsequent conduct and remarks by the respondent noting that:

> "I could have uplifted the sentence significantly because of his behaviour. I decided … on balance that I should acknowledge that he did after a couple of hours come to his senses. He did not run away. He admitted guilt … I thought that 15 years was an appropriate headline sentence."

[7] Thirdly, the trial judge reduced the sentence by a further three years, to reflect the respondent's history of mental health problems. They had been referred to in a psychiatric report commissioned pre-trial to determine whether he was fit to plead. The psychiatrist had access to the GP notes, which stated that the respondent (a) had been referred to mental health services by his GP on five occasions in the period 2018–2020, and (b) referred to Mr "Dark Side" and expressed concern that he could not control his desire to commit violence, which echoed how he had spoken to the police officers. The judge states "I thought there was evidence in the psychiatric report that his mental health problems had affected his self-control and disposed him to violence". He also noted that the respondent "did not have an extensive criminal record. He had one previous conviction in 2016. It covered two offences. Both involved violence." His difficult childhood and adolescence was a significant mitigatory factor.

Submissions for the Crown

[8] The sentence was unduly lenient (*HM Advocate* v *Bell* 1995 SCCR 244). Knife crime continues to be a scourge in Scotland, and deterrence is an important factor in the sentencing of such offences. In cases of murder a punishment part as low as 12 years would not be appropriate in the absence of strong mitigatory circumstances: *Boyle,* para 14. In the present case, the trial judge has erred in selecting the starting point for the sentence. A lack of premeditation does not automatically result in a starting point of less than 16 years: *McGrory* v *HM Advocate* 2014 SCCR 140.

[9] The trial judge erred in his assessment of the seriousness of the offence, the culpability of the offender and the harm caused. Categorising the actions of the respondent as impulsive does not take account of the severe nature of the attack having regard to the

number, type and location of the stab wounds. He gave undue weight to the respondent's mental health issues standing that the psychiatric report said that he retained insight into his behaviour and mental state, with no evidence of a major mental illness that would impair his insight or decision making. He did not take due account of the prior convictions, including the use of weapons. He failed to consider the whole context in which the respondent failed to seek assistance for the deceased, despite hearing him cry for help , but instead sent mocking messages to acquaintances. In any event this factor had already been taken into account in the selection of a headline sentence of 15 years.

Submissions for the respondent

[10] Weight should always be given to the views of the trial judge, especially in a case which has gone to trial and where the judge had the advantage of seeing and hearing the witnesses (*Bell,* p 251*)*. The sentence was lenient but not unduly so. The respondent was only 26, there had been no premeditation, he had called 999 eventually, he expressed remorse to the author of the CJSWR. It was suggested that the judge was entitled to conclude that there had been a loss of control by the respondent, based on what he said in the 999 call to the effect that he had "blacked out, freaked out". The strongest mitigation lay in his personal circumstances and disturbed childhood.

Analysis and decision

[11] In our view the sentence falls outwith the range of sentences which a judge at first instance, applying his mind to all the relevant factors, could reasonably have considered appropriate. There is nothing in the circumstances of this case that puts us at any disadvantage compared to the trial judge. He fell into error in three primary respects.

[12] First, he arrived at a headline sentence, which he then discounted for various factors he considered to represent mitigation. As the court noted in *HMA* v *MG* [2023] HCJAC 3 (para 12):

> "The Scottish Sentencing Council Guideline on the Sentencing Process makes it clear that the headline sentence is that arrived after consideration of all the circumstances of the case, including both aggravating and mitigating factors."

Such a sentence already reflects the factors advanced by way of mitigation.

[13] Secondly, he considered that a punishment part of 16 years would only be applicable in a case where the accused had gone armed with a knife meaning to assault the victim, as in *Boyle*. A figure at that level or above may be appropriate, depending on the circumstances of the case, and the nature of any aggravations.

[14] Thirdly, he did not properly recognise several significant aggravations, and the absence of virtually any mitigation. In particular:

(a). *The nature of the attack*

There were injuries indicative of a physical assault consistent with the libel including areas of bruising, a blunt force laceration to the head which was not consistent with, say, a fall; and a collection of bruises to the thumb and wrist described as potential defensive injuries. According to the post mortem report, five of the stab wounds would have required at least moderate force. The knife injuries included

(i) A stab wound under the jaw passing through muscles underneath

(ii) A stab wound to the left side of the neck penetrating through the base of the neck and severing blood vessels at the top of the heart. This alone would have been fatal.

(iii) A stab wound on the upper left side of the chest penetrating the side, damaging a rib, and puncturing the lung.

(iv) A further wound on the side had two tracks – explicable if a knife was inserted, partially withdrawn, and re-inserted at a different angle. One of these tracks travelled down, damaging the bowel; the other travelled upwards penetrating the heart and would alone have been fatal injury.

Taken altogether, these suggest an attack which was both sustained and vicious.

(b). *The mental element*

There was no reasonable basis to conclude that the respondent had acted impulsively, or that his mental health problems had affected his self-control and disposed him to violence. That does not accord with the vicious and sustained nature of the attack; nor does the callous behaviour and attitude of the respondent after the attack. The psychiatric report did not describe any concern regarding his mental state in the run up to, during, or after, the alleged offence; the author concluded that he had no delusional beliefs and that he retained insight into his behaviour and mental state. The report also noted that there had been no follow up from earlier mental health referrals, and a specific finding at one examination that "there was no evidence of an insight impairing mental illness". There was no evidence of a major mental illness which would impair his insight or decision making. It is true that he told the psychiatrist that when he gets angry he cannot control himself, but in light of the evidence as a whole, including the psychiatric evidence, and the comment from the respondent that he "stuck it into him", this is no basis for the trial judge to have reached the conclusion he did. Moreover, that conclusion is not consistent with the defence advanced, which was one of self-defence, or with the jury's rejection of provocation.

(c). *Assessing mitigation*

The respondent is hardly entitled to credit for the fact that he "did not run away", having gone to bed instead of seeking help, despite hearing the deceased crying for help, and

waiting for four hours before calling an ambulance. The trial judge erroneously stated that the respondent admitted his guilt: that is precisely what he did not do. He admitted causing the death, but disputed any criminal responsibility therefor.

(d) *Prior convictions*

The trial judge did not give adequate weight to the previous convictions. In stating only that they "involved violence", he fails to record – or to take account of –that both involved a weapon, the first being a bottle, and the second a knife which had been used to inflict severe injury and permanent disfigurement during an attempt to rob.

[15] For these reasons the appeal must succeed. We will quash the punishment part of 12 years and substitute one of 17 years.