APPEAL COURT, HIGH COURT OF JUSTICIARY

[2018] HCJAC 59
HCA/2018/000284/XC
HCA/2018/000286/XC

Lord Menzies
Lord Turnbull

OPINION OF THE COURT

delivered by LORD MENZIES

in

APPEAL AGAINST SENTENCE

by

(FIRST) LR and (SECOND) DM

Appellants

against

HER MAJESTY'S ADVOCATE

Respondent

First Appellant: Crabb; John Pryde & Co, Edinburgh for Dunlop Allan, Glasgow
Second Appellant: Findlater; Faculty Services Limited, Edinburgh for Bridge Litigation, Glasgow
Respondent: Carmichael AD; Crown Agent

18 September 2018

[1] On 26 February 2018 both LR and DM appeared at a trial diet at Dumbarton Sheriff Court on an indictment which narrated certain events which were alleged to have occurred on a train journey between Westerton and Bearsden on the evening of 21 December 2015. Each of the appellants had appeared on petition in May 2017. Their pleas were tendered some 9 months later.

[2] LR pled guilty to an amended charge 1 on the indictment that on the date specified he did behave in a threatening or abusive manner which was likely to cause a reasonable person to suffer fear or alarm in that he did shout, swear, utter threats of violence, utter lewd remarks and chase passengers from said train contrary to section 38(1) of the Criminal Justice & Licensing (Scotland) Act 2010. At the time of this offence LR was 17 years old and had no previous convictions. The sheriff sentenced him to detention for 32 months, discounted from 36 months to reflect the plea of guilty and imposed a 12 month supervised release order.

[3] DM pled guilty to an amended charge 3 on the indictment that on the date specified he did assault one of the passengers on the train and did repeatedly punch him on the head, knock him to the ground and repeatedly kick him on the body all to his injury. At the time of this offence DM was 15 years old. The criminal justice social work report which was before the sheriff indicated that he first began offending at the age of 12 years and had accrued a significant number of offences since this time most of which had been dealt with via the Children's Hearing system. He first appeared before the court aged 15 years and his offending behaviour since this time appeared to be influenced by peer relationships, excessive alcohol and drug misuse. His offences were disposed of by way of non-custodial and custodial sentences, the latter within the Young Offender's Institute and it appeared that a pattern of persistent offending had developed. The sheriff sentenced him to detention for 18 months, discounted from a headline sentence of 24 months to reflect his plea of guilty and imposed a supervised release order of 9 months.

[4] In each of his reports to this court the sheriff gave the details of the agreed narrative of events in broadly the following terms. The incident in question took place within a carriage on the 10.30 pm Glasgow to Milngavie train. At around 10.45 pm LR and DM were

observed by the conductor on the train boarding it at Westerton, along with others, in possession of alcohol. Four persons travelling as a group in the front carriage saw them entering that carriage. Since they were behaving in a rowdy fashion and had alcohol with them the members of the group in the front carriage were concerned for their safety.

[5] The co-accused, who is not party to this appeal, then approached the group in an aggressive manner with a glass vodka bottle in his hand. He was described as being "in the face" of the complainer in charge 2. Two persons attempted to pull him away and two of the group in the front carriage told one of the persons with that individual that they did not want any trouble. The sheriff was told that the four witnesses felt intimidated and threatened.

[6] LR then approached the complainer EA and having enquired as to which of the boys with her was her boyfriend and she having replied that none of them was he stated "I'm going to pump you, you're a wee belter" that is to say have sexual intercourse with her. The sheriff comments in effect since the complainer would plainly not have been a willing party to that the appellant was threating to rape her.

[7] As the train was approaching Bearsden Station, when the group of complainers tried to leave the train, the third accused challenged them and carried out a wholly unprovoked attack on the complainer in charge 2 by lifting the bottle he was holding and striking the complainer on the back of the head with it. He continued the assault by punching the complainer repeatedly on the head. As a result of this assault the complainer suffered injury. In particular the complainer suffered a lump on the back of his head. The sheriff was not given details of any other injuries.

[8] When the complainer in charge 3 went to assist, DM proceeded to carry out a wholly unprovoked attack on him by punching him to the head and face, knocking him to the

ground and thereafter repeatedly kicking him on the body. He too suffered injury as a result of this assault. In particular the complainer attended hospital later that night with an eye injury. He was found to have a superficial cut to his right eye which was closed with steri-strips. The sheriff was not given details of any other injuries. As the door of the train opened and the group of complainers ran off the train LR chased them. He shouted at the complainer EA "I'm still gonna pump you, but I'm gonna kill you first." In effect he was threatening that he was still going to rape her but that he was going to kill her first.

[9] In the context of all that had been going on, including the two unprovoked attacks by his co-accused, being chased and subjected to such a threat must have been very alarming indeed. The sheriff observes "It is I think fortunate that the injuries sustained by the complainers in charge 2 and charge 3 were not more serious than they were".

[10] Counsel on behalf of each of LR and DM submitted written submissions in terms of form 15.16 and adopted those submissions. On behalf of the appellant LR, Mr Crabb urged us to accept that the sheriff had failed to give adequate regard to the appellant's personal circumstances and in particular his age, the very difficult upbringing which he had had and which is narrated in the criminal justice social work reports and his poor decision making. He reminded us that section 207 of the 1995 Act applied to LR and also reminded us of the authorities to the effect that a young offender of approximately LR's age should be treated differently from an adult offender and that conduct could be and should be deemed less reprehensible and more capable of forgiveness in respect of a young offender. Any disposal he submitted should promote the growth of a healthy adult personality and identity and he referred us to the remarks made by the court in *McCormick* v *HM Advocate* 2016 SLT 793 particularly at paragraph 5 in which the court made reference to the English authority of

R(Smith) v *SSHD* and he submitted that a deterrent sentence should not be used often or to its fullest in respect of young offenders.

[11] Both Mr Crabb and Mr Findlater referred us to the cases of *Kane* v *HM Advocate* 2003 SCCR 749, *Smart* v *HM Advocate* 2016 SLT 1035 and in addition Mr Findlater referred us to *Hannon* v *HM Advocate* 2015 SLT 585. Reference was also made by Mr Crabb to *Divin* v *HM Advocate* 2013 JC 259 at paragraph 27.

[12] We take no issue of course with the principles enunciated in those cases and in particular the important and well-known dicta which were made in the cases of *Kane* and *Smart*. Clearly the age of a young offender is an important factor to which a sentencer must have regard and, as in any case, a sentencer must have regard to factors such as a deprived or difficult upbringing.

[13] It does not appear to us that the sheriff in either of these two appellants has failed to have regard to their young age nor has he failed to have regard to the difficulties that they have experienced in their young lives. In paragraph 15 of his report to us in the appeal by LR (and this is echoed in the equivalent paragraph in his report in relation to DM) the sheriff seeks to distinguish the circumstances of these appellants from the circumstances of the appellants in *Kane* and *Smart*. We consider that he was correct to do so.

[14] In *Kane* it is worthy of note that the appellant was a 16 year old alcoholic with a disturbed family background and who had pled guilty to robbing a 14 year old paper boy of some £44.00 at knife point. The appeal court observed that the sentence imposed by the sheriff was excessive, that the appellant was not much older than the complainer when he pled guilty. At paragraph 12 of its opinion the court said:

> "…his only previous conviction was in the district court. His previous record is not the worst that we have seen in a youth of his age. He has a disturbed family background. He suffers from alcoholism, a condition for which, it appears, his father is largely

> responsible. He has the opportunity to receive treatment for his problems and to reform his life. There are encouraging reports on his motivation to give up drinking. A community based disposal in our view offers reasonable grounds for hope that under suitable guidance he will overcome his drink problem, acquire a sense of responsibility and get a steady job."

[15] In *Smart* v *HM Advocate* the court was dealing with an accused person aged 18 who pled guilty to being concerned in the supply of heroin; it is indicated at paragraph 15 that:

> "…the appellant had an unsettled childhood after his parents split up when he was a year old. He had an itinerant lifestyle throughout his childhood, struggled to make friends, suffered bullying and displayed behavioural problems. His grandparents appeared to have brought the only stability into his life and it is clearly a positive factor that he has returned to live with them in this stable arrangement and that they are giving him their support. This contrasts with the somewhat rootless lifestyle lacking in routine or motivation that he was living in Fife. The appellant's decision to move away from Fife, the absence of any offending since doing so and the support of his grandparents are all described in the criminal justice social work report as protective factors. The possibility that his offending was related to an unsatisfactory peer group, naivety and poor judgement are as recognised in the report real ones. Forthright recognition by the appellant that he requires to take steps himself to address his future his actions in moving to Glasgow is a positive step in that respect and his anger at himself for becoming involved in this offence are all positive pointers for the future."

[16] We take no issue with those observations in the circumstances of those cases but those cases are not authority for the proposition that young offenders can go scot-free or never require a punitive element to sentencing. Each of the cases to which we were referred contained positive pointers for the future. Each contained some hope for improvement in the appellant's circumstances if the appellant was provided with adequate support in a non-custodial disposal. We have been unable to find any similar positive pointers in either the appeals of LR or DM.

[17] We are also unable to agree with the submissions that the sheriff has failed to pay adequate attention or to give adequate weight to factors such as the appellants' ages and their difficult background circumstances. Indeed it is clear that the sheriff would have imposed more severe sentences were it not for the age of each of the appellants and the

sentences which he did impose were such as to indicate that he paid full attention to these factors.

[18] Accordingly, each of these appeals must be refused.