



APPEAL COURT, HIGH COURT OF JUSTICIARY

[2019] HCJAC 20
HCA/2018/000572/XC

Lord Glennie
Lord Turnbull

OPINION OF THE COURT

delivered by LORD GLENNIE

in

APPEAL AGAINST SENTENCE

by

RICHARD FLEMING

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Stewart QC, E Dow; John Pryde & Co, Edinburgh for McGreevy & Co, Glasgow
Respondent: M Hughes, AD; Crown Agent

5 March 2019

[1] The appellant pled guilty to two charges of housebreaking on 12 June 2017 and one of loitering with intent, i.e. a breach of section 57(1) of the Civic Government (Scotland) Act 1982. He went to trial on three other charges of a more serious nature relating to violent armed robbery, to put it colloquially, at the Gleneagles Hotel at the end of June of that year, some two weeks later. He was convicted on those charges. The charges involved the use of

violence and the use of weapons, including a pistol, a machete and hammers. It was clearly planned and organised well in advance and although no physical and possibly no mental harm was caused to any of the people that got in the way, the threat of violence must have made the whole incident terrifying for those who were caught up in it.

[2] The trial judge imposed a cumulo sentence of 3 years imprisonment in respect of charges 1, 2 and 3 (the housebreaking and loitering with intent). She imposed an extended sentence of 18 years in respect of the more serious charges (charges 8, 10 and 11), comprising a custodial part of 15 years and an extension period of 3 years. The appellant appeals against both elements of that sentence on the grounds that the sentences were excessive, whether considered individually or cumulatively. He also contends that the judge ought to have discounted the sentence for charges 1, 2 and 3 to reflect the utilitarian value of the guilty plea.

[3] The accused already had a bad record. In particular, in 2007 he was sentenced to 9 years imprisonment at the Central Criminal Court in London for possession of a firearm with intent, contrary to section 16 of the Firearms Act 1968. It was therefore inevitable that the trial judge would take the view that a custodial sentence of a longer duration than that was necessary in the present case. Although the trial judge points to the fact that physical harm would aggravate the offence, it seems to us that the threat of physical harm is equally an aggravation. It is often a matter of chance whether that threat materialises.

[4] We can see no difficulty with the trial judge's approach in sentencing for these three offences at Gleneagles and we are not persuaded that the sentence of 15 years for those offences is excessive. No separate point was taken as to the extension period of 3 years.

[5] So far as concerns the incidents to which the accused pled guilty, namely the housebreaking on 12 June and a third charge of loitering with intent to commit theft, the trial

judge imposed a sentence of 3 years imprisonment. Having regard to the accused's record, we cannot find any fault with that sentence.

[6] What is argued is that the pleas to charges 1, 2 and 3 should have attracted a discount from that headline sentence of 3 years having regard to the utilitarian value of those pleas. It is said that the Crown was aware that the appellant was going to plead guilty to those offences and that may well have taken some of the pressure off the advocate depute in conducting that part of the case. That may be so but that is not "utilitarian value" to the plea as described in cases such as *Gemmell v HMA* 2012 SCCR 176 to which we were referred. There was no saving, or no significant saving, in time and cost of the trial or preparation for it – the evidence of the earlier offences still had to be led – and, although there may have been slightly shorter cross-examination, the learned trial judge was entitled to regard that as of no real value. In those circumstances we can see no error in the trial judge's approach of refusing a discount for that early plea of guilty. It was in the appellant's own hands as to plead guilty to the other offences and thereby give those early pleas to charges 1, 2 and 3 some utilitarian value, but he chose not to do so. He chose to go to trial on the other charges and must take the consequences.

[7] In all the circumstances the appeal is refused.