APPEAL COURT, HIGH COURT OF JUSTICIARY

[2019] HCJAC 45
HCA/2019/178/XC

Lord Justice General
Lord Drummond Young
Lord Malcolm

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in

CROWN SENTENCE APPEAL

by

HER MAJESTY'S ADVOCATE

Appellant

against

CJB

Respondent

Appellant: K Harper AD (sol adv); the Crown Agent
Respondent: Gebbie; Faculty Appeals Unit

14 June 2019

[1] This Crown appeal raises a question of whether repeated abusive conduct in the domestic context over a prolonged period of time ought to be met with a custodial disposal.

Background

[2] On 18 February 2019, at a trial diet in Aberdeen Sheriff Court, the respondent pled guilty to three charges involving assaults on his wife and two daughters. The first charge was that, on various occasions between 1998 and 2015, he assaulted his wife by, amongst other things, repeatedly punching and kicking her on the head and body, seizing her by the neck, repeatedly striking her head against a floor and brandishing a knife at her "all to her injury". The second charge was of a similar nature whereby, on various occasions between 2000 and 2015, he seized and dragged his daughter by the hair, repeatedly kicked her on the body, struck her head against a fireplace, seized her by the neck, pinned her against a wall and repeatedly struck her on the head and body again "to her injury". The third charge involved a second daughter, and was again of a similar nature, libelling that, on various occasions between 2004 and 2015, he repeatedly punched her on the body, repeatedly struck her on the head and body, held her by the throat and repeatedly struck her head against the ground and brandished a knife at her. No injury was libelled.

[3] The marriage had broken up in 2015, after the last of the assaults on the respondent's wife. The respondent had first been detained by the police in respect of the charges on 9 January 2018 and appeared on petition on the following day, some three years after the last of the assaults. He was indicted to a First Diet on 11 September 2018. The sheriff imposed a Restriction of Liberty Order, under which the respondent would be confined to his home address between 8.00pm and 8.00am for a period of 11 months. A probation order was imposed, involving 2 years supervision and 220 hours of unpaid work in the community.

Facts

[4] The respondent and his wife had married in 1991 and lived together until 2015.

There were three children of the marriage, including the two daughters. The respondent had originally been a fisherman. Notwithstanding the dates in the libel, the narrative of the assaults is that they began in 2000 when, on a number of occasions, the respondent pinned his wife against a wall and used abusive language towards her. In 2006, his wife was diagnosed with fibromyalgia, a condition which affected her back, legs and general mobility. She had to stop work. When they were in bed together, the respondent had accused her of inventing her condition. She replied that, if he did not believe her, he could leave. At this, he punched her on the upper body and kicked her on the back and legs.

[5] In 2007, the respondent stopped work as a fisherman and started in a chicken factory. He was at home more often and began drinking more. On one occasion he was on top of his wife and repeatedly struck her head on the floor. One of the daughters intervened and was also assaulted. On another occasion, after a school concert, he pinned his wife against a wall and repeatedly punched her on the body, stopping when she began to cry. In 2013, after the respondent's sister's funeral, he seized her arms, pushed her onto a sofa and used abusive language towards her, again stopping when she cried. In about March 2015, after an argument, he jumped on his wife, who was sitting on a bed. He placed both his hands around her neck, causing her breathing difficulties. One of the daughters intervened. The respondent left the room and returned with a knife, pointed it at his wife and daughter before giving the knife to his daughter and telling her to stab him. His wife then left the respondent.

[6] The older daughter described her childhood as "a waste of time" because of the respondent's behaviour "behind closed doors". He was angry and abusive with or without alcohol and behaved in this way from when she was 7 years old until she was 13 or 14. She had intervened when her mother was having her head banged off the floor. The respondent

had seized her by the hair, thrown her to the ground and repeatedly kicked her on the body and legs. He would use abusive language towards his daughter. He had pushed her against a wall on occasions and grabbed her throat, causing her breathing difficulties. When she was 12 or 13, his daughter had again attempted to intervene when her mother was being assaulted. The respondent had pinned her on a couch and seized her throat. He had kicked her repeatedly on the back and bottom and repeatedly banged her head off a stone fireplace.

[7] The younger daughter described herself as being afraid of the respondent throughout her childhood. He had a problem with alcohol. When she was about seven, the respondent had accused her of stealing her sister's iPod. He had repeatedly punched her and pushed her onto a bed. The respondent would often scream at his daughter. When she was fifteen, he had pushed her against a wall and shaken her. He had smashed her iPhone. She had intervened during the final incident involving her mother. The respondent had seized the daughter by the hair and dragged her across the floor, shaken her, thrown her to the ground and repeatedly struck her head on the floor.

[8] A victim statement from the respondent's wife revealed that she had been diagnosed with post-traumatic stress disorder in 2016 as a result of the abuse. She had undergone counselling. She had to give up work. She had moved away to England to start a new life. One of the daughters had also provided a victim's statement. This said that she suffered from depression and anxiety. She too had moved away from Aberdeen. She had struggled with drink and drugs as a result of her experiences. She had difficulty in maintaining relationships. She felt "robbed of a happy childhood".

The sheriff's reasoning

[9] Having heard the circumstances of the offences in detail, as well as the impact on the

complainers, the sheriff reports that she had a custodial sentence "very much at the forefront of her mind" when determining the appropriate disposal. The conduct was described by the sheriff as one of frequent abusive behaviour within the family context over a significant period of time. It was against the respondent's wife, and sometimes aggravated by being in the presence of the children. The conduct was also against the two daughters, starting when they were only 7 years old and subsisting until their teenage years. The sheriff regarded the offences as significant and serious. An unhappy marriage and difficulties with alcohol, albeit offered as explanation and context and not as an excuse, were not, in the sheriff's view, factors that significantly mitigated the offences. Nevertheless, she chose not to impose a custodial sentence.

[10] The respondent had a very limited criminal record, consisting of assault convictions in 2004 and 2005, which attracted admonition and a fine of £160. One of the convictions related to the respondent's wife. The conduct libelled had ended some 4 years previously. There were no reports of criminal behaviour thereafter. The respondent had been in employment throughout his married life. He was still in employment. He had formed a new long-term stable and supportive relationship with a "pro social" partner, who was aware of the offences. The respondent had taken steps to address his drinking. He had been pro-active in attending counselling to address his mental health issues, which included suicidal ideation and, on one occasion, an overdose. There was no aggravation of severe injury. The respondent was not assessed as presenting a significant risk to the public in general or to the complainers in particular.

[11] The sheriff had regard to the Scottish Sentencing Council's guideline "Principles and purposes of sentencing", which had been approved by the court in October 2018. This stated that "sentences should be no more severe than is necessary to achieve the appropriate

purposes of sentencing in each case". Balancing the principles and purposes of sentencing, the sheriff reached a view that a custodial sentence was not the only option available to her. It was not required as a measure of public protection. The respondent was suitable for a community disposal, given his minimum level of risk. Preventative and determinate measures and rehabilitation could be addressed during his period under supervision as part of the community order. Punishment would be achieved by the imposition of the Restriction of Liberty Order and the requirement of carrying out unpaid hours of work in the community. The Criminal Justice Social Work Report had recommended a community disposal. An RLO had not been recommended because of the nature of the respondent's work. The sheriff did not accept that that was a sufficient reason not to consider it as an alternative to a custodial sentence.

Submissions

[12] The advocate depute submitted that the sentence was unduly lenient. The offending behaviour was protracted and extended over a substantial period of time. It ought to have been dealt with by way of a substantial custodial disposal (*Kennaway* v *HM Advocate* 2019 SLT 391 at para [5]; KB v *HM Advocate* [2010] HCJAC 134 at para [9]; see also: *Cunningham* v *HM Advocate* 1997 GWD 34-1718; *Brown* v *HM Advocate* [2018] HCJAC 68; *Neill* v *HM Advocate* 1998 GWD 31-1586; *Alexander* v *HM Advocate* 2001 GWD 30-1181; *Strachan* v *HM Advocate* 1999 GWD 3-137; *McCormack* v *HM Advocate* [2014] HCJAC 6; *McKay* v *Vannet* 2000 GWD 3-92; Stead v *HM Advocate* 2001 GWD 1-24). The CJSWR had reported that the respondent did not accept much of the narrative to which he pled guilty. This indicated that he had neither accepted responsibility nor showed genuine remorse. An RLO had not been recommended. In all the circumstances the sentence failed to recognise the gravity and

extended scope of the offences. The respondent had left a trail of human misery. The sentence failed to satisfy the need for retribution and deterrence. The sheriff had placed too much weight on the respondent's personal circumstances and too little on the gravity of the offences.

[13] The respondent argued that the sheriff had correctly asked whether the only appropriate sentence was a custodial one. Parliament had not required such a sentence. The sheriff had taken all the circumstances and the sentencing guideline into account. The respondent had now completed 113 hours of community work. He had not been able to work offshore because of the RLO. He had suffered financially as a result.

Decision

[14] There can be little doubt that the repeated assaults, which the respondent perpetrated on his wife and two daughters over a prolonged period of time, could have attracted a significant custodial disposal. This is illustrated by several of the cases cited by the advocate depute. However, each case depends upon its particular facts and circumstances. Thus, in *Kennaway* v *HM Advocate* 2019 SLT 391, the twelve charges involved not only assaults on the appellant partner but also on her subsequent boyfriend and her female friends, as well as abusive conduct towards the police. In *KB* v *HM Advocate* [2010] HCJAC 134, the court quashed short custodial sentences in respect three complaints (the name of the case erroneously suggests a solemn libel) charging one assault on a cohabitee and two breaches of bail conditions. The sheriff had considered that only a custodial sentence was appropriate because of the appellant's disregard of court orders. The focus of the appeal was the effect of the sentences on the appellant's child.

[15] *Cunningham* v *HM Advocate* 1997 GWD 34-1718 involved an assault to injury and the danger of life by placing a rope around a cohabitee's neck and pulling it, causing her to lose consciousness. *Neill* v *HM Advocate* 1998 GWD 31-1586 was similar in nature. In both, custodial disposals followed. *Brown* v *HM Advocate* [2018] HCJAC 68 was concerned with six offences directed towards three different partners over a prolonged period of time, during which the appellant had been imprisoned for other offences of a violent and domestic nature. The appellant was assessed as posing a high risk of re-offending. The focus of the appeal was the correctness of the imposition of an extended sentence. In *Alexander* v *HM Advocate* 2001 GWD 30-1181 the appellant had already breached a previous community service order. *Strachan* v *HM Advocate* 1999 GWD 3-137 involved two police constables and a report indicating that the appellant was subject to "rage attacks", thus posing a risk of future similar conduct.

[16] *McCormack* v *HM Advocate* [2014] HCJAC 6 involved the appellant removing an 8 month old child from his partner, driving with the child unrestrained in the front seat of a car and driving that car at his partner. The case was prosecuted at summary level only. The same applies to *McKay* v *Vannet* 2000 GWD 3-92. It is, along with *Stead* v *HM Advocate* 2001 GWD 1-24, of some vintage now, although in *Stead* the custodial sentence for an assault to the injury of the appellant's wife was quashed.

[17] All of the cases are examples of where a custodial disposal may be appropriate and where it is not. In some, as in the present case, the terms of section 204(2) of the Criminal Procedure (Scotland) Act 1995 would have been applicable. A custodial sentence could be imposed only if "no other method of dealing with" the offender "is appropriate". That is a significant statutory restriction. Imprisonment is a sentence of last resort.

[18] The Scottish Sentencing Council's guideline "Principles and purposes of sentencing", which was approved by the court on 30 October 2018, provides that sentences must be "fair and proportionate". This principle requires that:

> "all relevant factors of a case must be considered including the seriousness of the offence, the impact on the victim and others affected by the case, and the circumstances of the offender".

It is clear from the sheriff's careful and detailed report that she did take all relevant factors into account including, particularly, the seriousness of the offences, the impact on the complainers and the circumstances of the respondent.

[19] The principle also requires that:

> "sentences should be no more severe than is necessary to achieve the appropriate purposes of sentencing in each case".

The sheriff paid specific regard to this guidance. The purposes of sentencing are set out in the guideline as including, in "no particular order", first, protection of the public. It was a feature of the respondent's case that the respondent was not considered as posing a substantial risk in the future, notwithstanding his new relationship. In any event, the two year period of supervision would address any residual risk in that context.

[20] The second purpose is "punishment". This could have been achieved by imposing a custodial sentence. However, in this case, the Restriction of Liberty Order would act as a significant penalty not only in itself but by preventing the respondent from working offshore. The requirement to carry out unpaid work in the community would also punish the offending behaviour. A third purpose is rehabilitation. This was attempted by the use of a supervision period, albeit that no particular courses or other steps were identified. The sheriff explains that she did not consider a compensation order was appropriate in the context of the fourth purpose, namely making amends, because of the respondent's means

relative to any assessment of damage. The final purpose, being the expression of disapproval, was met by the public sentencing process.

[21] The sheriff's balancing of the relevant factors, which was firmly based on a proper consideration of the sentencing guideline, may be seen as producing a lenient sentence. That sentence is, however, well reasoned. It cannot be regarded as "unduly lenient" in terms of section 108(2)(b)(i) of the 1995 Act. The appeal is therefore refused.