APPEAL COURT, HIGH COURT OF JUSTICIARY

[2022] HCJAC 45
HCA/2022/52/XC
HCA/2022/50/XC

Lord Justice General
Lord Pentland
Lord Boyd of Duncansby

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in

NOTES OF APPEAL AGAINST SENTENCE

by

DARREN MORTON EADIE and JOHN KENNEDY

Appellants

against

HIS MAJESTY'S ADVOCATE

Respondent

Appellant (Eadie): A Ogg (sol adv); Paterson Bell (for Fitzpatrick & Co, Glasgow)
Appellant (Kennedy): G Brown (sol adv); Faculty Services (for Bridge Legal, Glasgow)
Respondent: Edwards KC; the Crown Agent

2 December 2022

The Convictions and Sentences

[1] On 9 February 2022, at the High Court in Edinburgh, the appellants were found guilty, along with two co-accused (Morton Eadie and Ross Fisher), of the murder of Kenneth Reilly on 16 April 2018. Mr Reilly was the passenger in a car being driven on Bilsland Drive

at its junction with Maryhill Road, Glasgow. A stolen Ford S Max pulled up alongside. A back seat passenger, thought to be Mr Kennedy, opened the door of the Ford and fired 6 shots, 5 of which missed the deceased's car and one of which delivered a fatal blow to the deceased's forehead. The offence was aggravated by a connection with serious organised crime (Criminal Justice and Licensing (Scotland) Act 2010, s 29). The accused were found guilty of an additional charge of attempting to defeat the ends of justice by setting fire to the Ford after the murder.

[2] The appellants were both sentenced to imprisonment for life on the murder conviction with a concurrent 5 years imprisonment on the additional charge. Mr Eadie, who had organised the shooting in retaliation for an assault with machetes on his friend Ryan McAteer on 8 April 2018, was given a punishment part of 24 years. Mr Kennedy's punishment part was set at 26 years, because of his more extensive record.

Statutory provisions

[3] Part 1 of the Serious Crime Act 2007 introduced the serious crime prevention order to England and Wales. The provisions were extended to Scotland by amendments effected by the Serious Crime Act 2015. An SCPO can be made in one of two ways: first, on an application to the civil courts (Court of Session or a sheriff court (s 1(1A)); and, secondly, on conviction in the High Court or sheriff court (s 22A(2)). In each case the test is whether the person has been involved in serious crime and the court "has reasonable grounds to believe that the order would protect the public by preventing, restricting or disrupting involvement by the person in serious crime" (ss 1(1A)(b); 22(A)(2)). The order may contain such prohibitions, restrictions or requirements and such other terms as the court considers appropriate for the order's central purpose (ss 1(3) and 22A(4)).

[4] An SCPO is defined, for the purposes of part 1 of the Act, as including both a " stand alone" order from the Court of Session or the sheriff court under section 1(1A) and an order of the High Court or the sheriff court under section 22A (s 1(5)). If that is correct, then sections 16 to 18 must apply to both. Section 16 of the Act provides that an order must specify when it is to come into force and when it is to cease (s 16(1)). An order has a maximum duration of 5 years (s 16(2)) but a new order may be made, including one in anticipation of an earlier order ceasing to be in force (s 16(5) and (6)). Although highly unusual, and surprising, the Court of Session or the sheriff court (the "appropriate court") appear to have been given the power to vary an order (s 17(1A) made by either a criminal or a civil court. In that respect, proceedings in either the High Court or a sheriff court under section 22A (ie in a criminal court) are defined as "civil proceedings" (s 36A(1)). If an application is by the affected person (s 17(3)) it can only be made on a change of circumstances since the order was made (s 17(4)). If it is on the application of the police, it has to be made to the Court of Session and cannot be made to the sheriff (s 17(7A)). The Court of Session may discharge an order in a similar way; ie a change of circumstances.

The applications

[5] On 9 March 2022 the Crown applied for SCPOs under section 22A. Mr Eadie was 30 and had previously been a scaffolder. The application cited his 10 previous convictions. These were almost all relatively minor public order or road traffic offences. However, in August 2019 he was sentenced to 22 months imprisonment, with an eleven months supervised release order, for assault to injury and the danger of life involving the use of a hammer. The application referred to certain pending cases, including assault and assault to

injury and the danger of life, but at least some of these had been disposed of without any culpability attaching to Mr Eadie.

[6] Mr Kennedy was 41. It was not known how he supported himself since he was unemployed, but not in receipt of benefits. He had 8 previous convictions, including a firearms offence (which did not result in any sentence), assault to injury, misuse of drugs and housebreaking. There was reference to Mr Kennedy being involved in another murder some 12 years ago but his involvement in that was not established.

[7] In what was described by the trial judge as a "very concise" submission, the Advocate depute argued that there were reasonable grounds to believe that the SCPO would protect the public by preventing, restricting or disrupting involvement by the appellants in serious crime. There was a real risk of further offending which rendered the order appropriate. The appellants argued that it was not appropriate to make an order which would not take effect for at least 24 years. The Parole Board's discretion should not be fettered. The future risk must be a real or significant one and not just a possibility. .

[8] The trial judge imposed an order; the statutory conditions having been met. The order was for a period of five years after release from prison. The judge did not consider that either appellant would be harmless upon release. Parole Board licensing conditions were part of a different regime (*R* v *Hall* [2015] 1 Cr App R (S) 16). The order contained notification requirements in relation to addresses, the ownership and use of motor vehicles, phones or computers, firearms and travel outside Scotland. There was a requirement to report to the police twice a year; a prohibition on associating or communicating with the co-accused (other than between Mr Eadie and his co-accused father); and a limitation on their possession of more than £1,000 in cash.

Submissions

[9] The appellants expanded upon the submissions which had been made to the trial judge. There was a material difference between determinate and indeterminate sentences. Although an order could be made when an indeterminate sentence had been imposed (*R* v *Dunning* [2018] EWCA Crim 3018), the circumstances had to be special. The court was concerned with future risk. That risk had to be real, or significant, not a bare possibility (*R* v *Hancox* [2010] 2 Cr App R (S) 74 at para 9). Any SCPO ought to be proportionate as it would inevitably engage Article 8 of the European Convention. The order must be commensurate with the risk (*ibid* at para 10).

[10] An analogy could be made with violent offences prevention orders in Northern Ireland (Justice (NI) Act 2015 part 8). These too could be "free standing", that is made on application to a civil court, or part of a sentencing process (*R* v *Hanrahan* [2019] NICA 75 at para 32). The court had to focus on the post-release phase (*ibid* at para 40). With a free standing order, the court's forecast was of the immediate future whereas, with an order to take effect at the expiry of a long sentence, assessment will be more difficult. The more distant liberty was, the more challenging the application of the test (*ibid* paras 43-44). The most significant imponderable would be the person's progress in prison. "The sentencing judge's armoury did not include a crystal ball" (*ibid* para 46).

[11] If the decision were left to be made following a later free standing order, a much more informed decision could be made (*ibid* para 47). An order made at a sentencing diet risked operating as a disincentive to rehabilitation (*ibid* para 48). Given the licence regime for the release of life prisoners, an SCPO would only be necessary where the Parole Board failed to exercise its functions. There was a presumption that, if released on parole, the convicted person no longer posed a risk to the public. If the appellants were released on

licence, they could be recalled by the Board or, in an emergency, by the Scottish Ministers. In any event, the conditions in relation to motor vehicles, associations, possession of cash and phones etc were unnecessary and disproportionate.

[12] The Crown responded that Parliament must have considered that the orders would supplement the system of parole (*R* v *Hall* at para 31). A risk could be so serious that an order subsequent to even an indeterminate sentence would be appropriate (*R* v *Dunning* at para 15). The trial judge felt able to assess the risk on the information before him, including the convictions. The test for release on parole (Prisoners and Criminal Proceedings (Scotland) Act 1993, s 2(5)) did not involve that release being entirely risk free. The judge was best placed to determine whether an order was necessary and proportionate. He had applied the correct test and had not erred in his assessment.

Decision

[13] Section 22A(2) of the Serious Crime Act 2007 provides that the High Court can make a serious crime prevention order in respect of a person who has been convicted of a serious offence if there are reasonable grounds to believe that the order would protect the public by preventing, restricting or disrupting the person's involvement in serious crime. The SCPO regime is not restricted to determinate sentences or to cases in which the person involved will not be the subject of bespoke licensing conditions throughout the duration of any post release parole. The sentencing judge will have a wide discretion when determining whether an SCPO is both appropriate and, for the purposes of Article 8 of the European Convention, proportionate.

[14] The court agrees with the reasoning of McCloskey LJ, delivering the judgment of the Court of Appeal in Northern Ireland, in *R* v *Hanrahan* [2019] NICA 75; albeit in a different but analogous context. As he put it (at para 44):

> "The more distant the first day of liberty for the sentenced [accused] the more challenging the application of the statutory test will be".

[15] The trial judge, in predicting whether any future risk was real, rather than a possibility, was certainly entitled to take into account, as an extremely important factor, that this was a cold blooded assassination. Nevertheless, and accepting that some convicted criminals may be beyond redemption, a second important, but absent, factor is the progress toward rehabilitation, which one or both of the appellants might make, over the quarter century during which they will remain incarcerated. Having regard to the substantial length of time which will elapse before their possible release, and to the fact that the chief constable will be at liberty to apply for an order before any such release, the court does not regard it as a proportionate response to the prospective risk, that an SCPO be made at this stage. It will therefore quash the orders.