



APPEAL COURT, HIGH COURT OF JUSTICIARY

[2024] HCJAC 27
HCA/2024/174/XC

Lord Justice General
Lord Boyd of Duncansby
Lord Beckett

OPINION OF THE COURT

delivered by LORD BECKETT

in

NOTE OF APPEAL AGAINST SENTENCE

by

MAXIMILIANO MORENO

Appellant

against

HIS MAJESTY'S ADVOCATE

Respondent

Appellant: Ogg (sol adv); Paterson Bell (for MTM Solicitors, Falkirk)
Respondent: Gill KC AD; the Crown Agent

10 July 2024

Introduction

[1] The sentencing judge imposed an Order for Lifelong Restriction with a punishment part of 32 months' imprisonment at the High Court at Glasgow on 25 March 2024, following the appellant's pleas of guilty to four charges at a continued preliminary hearing. The OLR

related only to charge 1. On charges 2, 3 and 4 the judge imposed a concurrent sentence of 18 months *in cumulo*. Both sentences were backdated to 23 June 2022.

[2] Charge 1 occurred on 21 June 2022 in a town in the central belt when the appellant, with his face masked, approached the female complainer from behind and assaulted her with intent to rape. He put his arm around her neck and compressed it, restricting her breathing. He struggled with her to her injury and attempted to detain her against her will.

[3] Charge 2, under section 38(1) of the Criminal Justice and Licensing (Scotland) Act 2010 (statutory breach of the peace), narrated his brandishing a knife and threatening two other persons in the aftermath of the attack. Charge 3, under section 47(1) of the Criminal Law (Consolidation) (Scotland) Act 1995, related to his possession of a knife in a public place. Charge 4 was an attempt to pervert the course of justice by trying to obtain a change of clothing to thwart identification, disposing of items he had worn and the rucksack he had at the time of the attack together with its contents; cable ties, pliers, latex gloves, scarves, condoms and lubricant.

The circumstances of the crimes

[4] Charge 1 occurred as the complainer, aged 20, walked home from work alone. She had seen the appellant earlier and then became aware that he was following her. He had been captured on CCTV footage loitering in the general area beforehand. As she walked through a secluded wooded area, he accosted her from behind, put his left forearm around her neck and began squeezing. At first she thought this was a joke, but he said nothing and tightened his grip. She was struggling to breathe and panicking. She managed to drop to the ground allowing her to scream as loudly as she could. When he relaxed his grip she

broke free and ran towards her home nearby. She began to take photographs of him with her mobile phone and he ran away.

[5] As he fled, the appellant approached two people in the street and asked for a shirt, saying he was too hot. They told him to take down his hood from his head. In due course police would discover his rucksack abandoned nearby, containing the items referred to in charge 4.

[6] The complainer immediately told her mother and sister who began following the appellant on foot and then by car, along with the complainer. As they saw him approach a shop, the complainer's mother got out of the car and shouted for people to call the police as the man had attacked her daughter. The appellant then approached the mother and shouted at her to get back as he had a knife. She saw that he had a kitchen knife with a blade of about 5 inches.

[7] Shortly afterwards, police encountered the appellant topless and holding the knife in his trouser pocket to conceal the blade. He was wearing a black face-mask, black tracksuit bottoms and was trying to remove his shoes. They found his hooded top nearby and soon afterwards his rucksack and contents. He was arrested and on being interviewed said nothing and provided no personal or other details.

Risk assessment report

[8] The appellant is 22 and was 20 when he committed these crimes. He was living alone and had been unemployed for two weeks beforehand having worked in a restaurant. He had generally worked since being excluded from school in his fifth year. He has no previous convictions. He came to Scotland from Argentina as a young child with his parents with whom he grew up before moving into a flat aged 18. His lack of facility in English

made his early years at nursery and school challenging. Dr John Baird narrates that police recovered writings from the appellant's home relating to more than a dozen people, as if he was in control of them and was telling them what he would do to them. They appeared to be people against whom he had a grudge. In the writings he detailed acts of extreme violence to which he might subject them. One note was written to a woman he seemed to know with whom he was infatuated. Some of the persons named were people he knew from school.

[9] The appellant's behaviour at school gave rise from time to time to concerns from both staff and pupils. He was excluded from school in his fifth year as a result of making a threat to explode a bomb within the school grounds and to shoot other pupils. He became depressed and was referred to Child & Adolescent Mental Health Services (CAMHS). He attended for two years as an outpatient and responded well to anti-depressants. As a result of saying odd things, the appellant was given antipsychotic medication but it later turned out that he was not psychotic. The threats made at school led to an assessment by forensic mental health services but no conclusions were reached. Shortly after he was discharged from their list, the appellant threatened to commit suicide and was voluntarily admitted to the psychiatric unit of a local hospital for three weeks. He improved and was discharged and seen as an outpatient for a year before final discharge. In 2019 he was considered to show some autistic traits but did not reach the threshold for a diagnosis of autism spectrum disorder.

[10] Dr Baird found that he did not reach the threshold for any specific personality disorder but there were features relevant to risk, particularly lack of empathy, grievance thinking and bearing grudges.

[11] The appellant had sought to explain his actions towards the complainer as the result of sexual frustration. He said he had been seeing a woman, not the complainer, whom he met online but nothing sexual happened between them. His accounts of having had a two year relationship with a young woman and a number of casual sexual liaisons did not seem plausible and were not supported by his mother. It is possible he has no sexual experience.

[12] The appellant suggested that his actions on 21 June 2022 had been somehow outwith his control. He had snapped and could not explain what he did or why he had with him the items found in his rucksack but accepted responsibility for what happened. He stressed that being in prison had brought home to him the importance of his freedom.

[13] School records disclosed that in primary 1 he exhibited temper which he tried hard to control. In primary 2 he bit another child, punched two girls and had his hands around one girl's neck. He had punched two people and threatened and chased another boy. He was noted to show physical aggression towards other pupils. In 2015, when he must have been 13, he was noted to hit, push and fight at school. In 2017 he was noted to have cut another pupil on the head with a screw and used a screw as a weapon on other occasions. He had said he would stab this pupil, put him in the hospital and burn down his (the other pupil's) old orphanage. He had also scratched him with a pen.

[14] GP records disclosed that in 2018 he was excluded from school for threatening to make a bomb and explode it in the school grounds. He had said he wanted to shoot other pupils. He had stabbed a pupil's hand with a pencil. His mother knew that he had been researching online how to make a petrol bomb and was very concerned. He had worsening anger difficulties. He reported being depressed and frustrated, could be argumentative and volatile and appeared to have difficulties developing skills to deal with his emotions. In August 2018 he was referred for a violence risk assessment. He described having angry

thoughts and considering how he would harm particular named individuals, kidnapping and murdering them. In conclusion, Dr Lorraine Johnstone, clinical and forensic psychologist who is also a Risk Management Authority Risk Assessor, considered that the appellant had poor anger control and was managing this through violent ideation. He had impaired stress management and a lack of empathy. He showed what could be aspects of narcissism such as grandiosity, a need for admiration and a lack of empathy.

[15] Forth Valley Royal Hospital records reveal that his mother had reported that he did not seem to learn boundaries and was always getting into trouble. In 2018 it appeared that:

“He was obtaining gratification from his violent thoughts and what was prominent was his vulnerability to anger and poor stress control, poor coping and his lack of empathy.”

[16] In August 2018 he said that his previous plan to kidnap and seriously harm a school teacher was no more than fantasy. In November 2019, he threatened his father with a knife.

[17] Dr Baird learned from the police that on searching the appellant’s home they found a list of items he would need to carry out murders of people he planned to abduct and murder. They found rolls of duct tape, a large new tarpaulin and binoculars. Notes found referred to stalking behaviours. In other papers, he had described the making of gunpowder, administering tranquilisers to a person and digging a grave to bury a body.

[18] Risk factors relevant to the risk of future violence were identified. The appellant:

“...has a history of threatened and actual violence towards those around him, he has had troubled relationships with family, peers and those in authority over him although in relation to those in authority, those problems have been less in recent years. Also he has shown evidence of violent attitudes and in the past he has had mental health problems. He himself has lacked insight into his problems, has harboured violent ideation and has been emotionally unstable.”

[19] Dr Baird identified a number of protective factors at para 3.8.3 although those which pre-existed were not effective in preventing the offending in this case. Factors consequent to his conviction could come to be important in the future:

“...his willingness to accept treatment, his co-operation in the past with medication and likely co-operation in the future, his willingness to cooperate with professional care and his positive response to external controls.”

Dr Baird wrestled with the issue of which risk level to assign to the appellant. He noted that this was a case which lay between high risk and medium risk and that it would probably be possible to advance an argument supporting either of those two risk levels. In coming to the conclusion that the appellant was no more than medium risk Dr Baird noted that the appellant had never previously been confronted with the consequences of his actions. He had never previously been subject to any form of criminal justice supervision, nor any social work contact. This presented difficulties when reaching an opinion. He noted that given his age there was scope for maturation. His arrest, prosecution and imprisonment had had a considerable effect on the appellant. He was co-operative in custody and engaged in the assessment process. There was reason to believe that the punishment and general deterrence had an impact on him. If it were otherwise one might have expected his behaviour to include opposition to the prison regime and difficulties from other inmates. There was no evidence of such responses.

The judge's reasons

[20] The judge had noted that Dr Baird judged that the risk presented by the appellant lay between medium and high risk (RAR para 2.21) in part because he considered that, in the absence of previous criminal history, future assessment of risk was speculative. He noted what Dr Baird had written (para 2.7) about materials found at the appellant's home in which

he had written of his plans for a number of people, recording threats to torture, murder and bury them.

[21] The appellant was aggressive at school and had scratched people with a screw on one occasion. He had talked of making bombs and attacking a church, praised terrorist attacks and showed video recordings of them to classmates. Despite his protestations that he was joking, staff were concerned. On referral for psychiatric assessment and support he was not found to be psychotic.

[22] The appellant told Dr Baird of intimate relationships which were unknown to his mother. He refused to provide details to Dr Baird. The judge concluded that the appellant was at best an unreliable source of information and a fantasist. Counsel conceded in mitigation that the appellant's account of events surrounding his crimes was untrue and the appellant could give no explanation of his actions.

[23] The judge recognised the possibility that the appellant would address his issues so that he would not present an enduring risk. Given the nature of the offence, his unwillingness to discuss or explain it, the issues which had arisen in childhood and adolescence, the written materials in his house and his preparations to commit charge 1, he concluded that the appellant does present an enduring risk and would be likely to commit a similar offence when released from prison.

Note of appeal

[24] The appellant contends that the criteria for making an Order for Lifelong Restriction were not met. He founds on:

- his age when he committed the crime (20) and at the date of sentencing (22);
- his early plea and associated acceptance of responsibility;

- his lack of previous convictions;
- his progress whilst remanded in custody and his enhanced confidence, communication skills and group participation on a performing arts programme;
- his work since leaving school;
- his supportive family;
- his lack of substance issues;
- his co-operation during meetings and assessments with the risk assessor;
- his willingness to undertake offence focussed work, show signs of being able to engage in the process, his motivation to address his problems and behaviours with scope for maturing further.

He also highlights certain favourable observations from Dr Baird's risk assessment report concerning his level of risk:

- his potential to change and to be managed;
- his co-operation which supported the punitive and deterrent effects of sentencing having already taken effect during his remand in custody as vouched by his behaviour towards fellow inmates and in the face of the prison regime;
- some characteristics indicated that measures short of an OLR may be sufficient to minimise the risk of serious harm to others;
- he had displayed capacity for self-management and had made some progress with it.

Written and oral submissions for the appellant

[25] Ms Ogg, Solicitor-advocate for the appellant, adopted the contentions in the grounds of appeal inviting us to conclude that the sentencing judge erred in imposing an OLR. To do so he would need to have been satisfied that once at liberty serious endangerment to the

public would occur. She referred to the opinion of the Lord Justice Clerk (Carloway) in *Ferguson v HM Advocate* 2014 SCCR 244 particularly paras [98], [103] and [107]. She sought to distinguish the appellant from the circumstances of *Mitchell v HM Advocate* 2024 SCCR 131 in support of her contention that the judge erred in concluding that, on a balance of probability, the risk criteria were met.

[26] Despite the gravity of the offence in charge 1, the court should conclude that the appellant's relative youth and his associated limited culpability and enhanced potential for change and rehabilitation indicated a lower level of risk such that an extended sentence, perhaps with a ten year extension period, ought to have been imposed. It would permit and facilitate his ongoing rehabilitation which was one of a number of cogent considerations given the appellant's age and its significance as explained in sentencing guidelines.

[27] Dr Baird's report explained the need for caution with assessment of a personality not fully formed at the appellant's age and the potential for positive change with maturity and socialisation. Evidence of his positive response in prison supported Dr Baird's views. He has behaved well and engaged in constructive activities confirmed in references. In all the circumstances, and given Dr Baird's assessment of a medium risk, the judge erred by not imposing an extended sentence.

Decision

[28] Section 210F (1) of the 1995 Act provides that in a case such as this, ie where a compulsion order is not under consideration, the court:

“...if it is satisfied, having regard to—

- (a) any risk assessment report submitted under section 210C(4) or (5) of this Act;
- (b) any report submitted by virtue of section 210D of this Act;

- (c) any evidence given under section 210C(7) of this Act; and
- (d) any other information before it,

that, on a balance of probabilities, the risk criteria are met, shall ...make an order for lifelong restriction in respect of that person.”

[29] Section 210E of the 1995 Act provides that:

“...the risk criteria are that the nature of, or the circumstances of the commission of, the offence of which the convicted person has been found guilty either in themselves or as part of a pattern of behaviour are such as to demonstrate that there is a likelihood that he, if at liberty, will seriously endanger the lives, or physical or psychological well-being, of members of the public at large.”

[30] Since the appellant may lie between the categories of high risk and medium risk as defined by the RMA, we set out those risk criteria.

“High

The nature, seriousness and pattern of this individual’s behaviour indicate an enduring propensity to seriously endanger the lives, physical or psychological well-being of the public at large.

The individual has problematic, persistent, and pervasive characteristics that are relevant to risk and which are not likely to be amenable to change, or the potential for change with time and/or intervention is significantly limited. Without changes in these characteristics the individual will continue to pose a risk of serious harm:

- There are few protective factors to counterbalance these characteristics
- Concerted long-term measures are indicated to manage the risk, including restriction, monitoring, supervision, and where the individual has the capacity to respond, intervention
- The nature of the difficulties with which the individual presents are such that intervention is unlikely to mitigate the need for long-term monitoring and supervision.

In the absence of identified measures, the individual is likely to continue to seriously endanger the lives, or physical or psychological well-being of the public at large.

Medium

The nature, seriousness and pattern of this individual’s behaviour indicate a propensity to seriously endanger the lives, physical or psychological well-being of the public at large.

The individual may have characteristics that are problematic, persistent and/or pervasive but:

- There is reason to believe that they may be amenable to change or are manageable with appropriate measures
- There is some evidence of protective factors
- The individual has the capacity and willingness to engage in appropriate intervention
- They may be sufficiently amenable to supervision, or
- There are other characteristics that indicate that measures short of lifelong restriction may be sufficient to minimise the risk of serious harm to others.”

[31] We have carefully considered Ms Ogg’s submissions and all of the material before us. We adopt the approach explained in the opinion of the Lord Justice Clerk in *Ferguson*. As the appellant accepts, it was for the trial judge to determine the level of risk he presents by applying his experience to the whole circumstances, paying particular attention to the RAR and whether he meets the criterion for an OLR. In practice, the question for the sentencing judge was whether it is more likely than not, meaning probable, that the appellant when at liberty will seriously endanger the public.

[32] It is a feature of this case that Dr Baird proposed at para 2.21 that the appellant’s level of risk lies between high and medium albeit he considered that the absence of previous convictions, supervision, confrontation with the consequences of his actions and social work contact made this assessment particularly difficult, concluding:

“Put more simply, there is no previous history of response or otherwise to which reference can be made and as a consequence, any opinion about future response and risk must unavoidably and inevitably include a degree of speculation.”

We attach significance to Dr Baird’s consideration of protective factors at para 3.8.1 [iii]:

“Regarding the perpetrator risk factors in this case, there are a considerable number which are relevant and significant. He minimises his offending and the impact upon the victim, his attitudes do not display an understanding of the full nature of what he has done, he lacks self-awareness in that he does not show evidence of understanding how his behaviours, including his stalking behaviour, would be viewed by others, he has a long history of coping poorly with stress, threat or challenge, the details of his sexual expressions and his relationships to this point is unclear and he himself frequently cites his problem with “sexual frustration” (his

words). Furthermore, and although he does not reach the threshold for psychopathy, he has psychopathic traits - lack of empathy, and guilt, which are relevant to his risks, also he has been subject to recurrent episodes of depression and some possible psychotic features, recurring and intensely violent ideation, a failure to achieve and maintain intimate relationships, impaired non-intimate relationships and to this point, treatment and supervision, albeit on a voluntary basis by those not aware of his full potential, has been ineffective in the long term. As time has passed however, his potential risks appear to be much more focused around his sexuality, his infatuation and his perception of his own sexual frustrations.”

[33] The items in possession of the appellant perhaps speak for themselves, but we infer that he had cable ties and pliers with a view to controlling his victim with them as handcuffs or a ligature. His possession of latex gloves shows forensic awareness. For reasons he has not explained, he got so far as to equip himself with various sinister items, identify a target, follow her and assault her by choking her around the neck. He attempted to abduct her and intended to rape her. It was good fortune that the complainer showed the resilience and presence of mind which she did to thwart his attack proceeding further.

[34] In *Ferguson*, at para 107, the Lord Justice Clerk noted application of the criteria adopted by the RMA means that an assessment of a medium level or risk by the risk assessor implies the offender: “...has a ‘propensity’ seriously to endanger the public with characteristics which are problematic, persistent or pervasive, but which may be amenable to change.” The court must be realistic about prospects for change in deciding whether the risk criteria are met. There must be significant change or effective management to temper propensity. He observed that a young offender, whose actions were on one occasion prompted by intoxicants rather than underlying personality traits, and with a prospect of change over time with maturity and rehabilitation measures, would not readily meet the risk criteria.

[35] The appellant does not obviously match the situation last described. There was no intoxication and he does have at least some concerning personality traits. This may be his

first appearance in court but he has a history of challenging and violent behaviour which caused serious concerns at school and at home. The various mental health interventions to which he has been subject over the years did not deflect him from committing these crimes.

[36] We recognise that the appellant was and is a young offender within the scope of Scottish Sentencing Council's guideline, "Sentencing young people." His relative youth bears on his culpability and he may mature. He may have greater capacity for change and rehabilitation, the latter being a more prominent sentencing consideration for someone of his age but protection of the public remains a very important consideration in his case.

[37] Dr Baird did find some grounds for optimism that he has responded and will respond to confinement and will reduce the risk he presents as he matures and engages in rehabilitative programmes. Like the trial judge, we have considered certain references regarding his participation in constructive activities in custody. Nevertheless, when considering the appellant's preparations, intention and conduct against the background of other violent and troubling behaviours, which persisted through his childhood and into his young adult life, we conclude that the judge was correct in determining, for the reasons he gives, that the risk criteria were met. As such, he was bound to make an OLR. The appeal is refused.