APPEAL COURT, HIGH COURT OF JUSTICIARY

[2020] HCJAC 41
HCA/2020/000054/XC
HCA/2020/000071/XC
HCA/2020/000063/XC

Lord Justice General
Lord Malcolm
Lord Turnbull

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in

NOTE OF APPEAL AGAINST SENTENCE

by

(First) KEIRIN McMILLAN or ELLIOTT; (Second) ARON McMILLAN; and (Third) LEVI HUNTER or BROWN

Appellants

against

HER MAJESTY'S ADVOCATE

Respondent

First Appellant: K Stewart QC, Dow; WSA Bannerman Burke
Second Appellant: M Jackson QC, Nicolson; AT Gilbertsons, Dalkeith
Third Appellant: Findlay QC, Young; John Pryde & Co SSC (for Graham Walker, Glasgow)
Respondent: Farquarson QC AD; the Crown Agent

4 September 2020

Introduction

[1] These three appeals concern the appropriate punishment parts to be imposed when a child or young offender is sentenced to detention for life. The court emphasises that the

punishment part does not represent the custodial term after which the offender will be released from custody. It is a minimum period during which the offender will not be entitled to apply for parole. It represents the period of time which the court considers appropriate to satisfy the requirements for retribution and deterrence (Prisoners and Criminal Proceedings (Scotland) Act 1993, s 2(2)). Whether, and if so when, the prisoner will be released from custody will, after the expiry of the punishment part, be a matter for the Parole Board for Scotland.

General

[2] Keirin Elliott was born in January 2000, Aron McMillan in December 2002 and Levi Brown in June 2003. On 29 November 2019, at the High Court in Edinburgh, they were all found guilty of a charge which libelled that:

> "(005) on 21 February 2019 at Flat… Clearburn Road, Edinburgh you… did assault Alasdair Forsyth, born 10 May 1951, then residing there, repeatedly strike him on the head and body with a screwdriver, a hammer, a wrench, a walking stick and glass picture frames or similar items, kick him on the head and body, stamp on his head and body… rob him of a tablet and a mobile phone and you did murder him".

[3] In addition, Mr McMillan, who is Mr Elliott's younger brother, was found guilty of a number of assaults to injury in Edinburgh, *viz*: (001) on RM, aged 14, on 28 January 2019 at Ferniehill Road, by knocking him to the ground, repeatedly punching and kicking him on the head and body and robbing him of his mobile phone and a packet of cigarettes; (002) on GS, aged 14, on 3 February 2019 at Sharpdale Loan, by repeatedly punching and kicking him on the head and body and knocking him to the ground; (003) on AG, on 5 February 2019 at the Cameron Toll Shopping Centre by pushing him and repeatedly punching him on the head; (004) on DD, also on 5 February at the shopping centre, by repeatedly punching and

kicking him on the head and body. Mr Brown was also found guilty of aspects of charges 2, 3 and 4.

[4] All three were sentenced to be detained for life with punishment parts of: (1) 18 years for Mr Elliot; (2) 17 years and 3 months for Aron McMillan; and (3) 17 years for Levi Brown. The sentences all ran from 25 February 2019.

Facts

Charges 1 to 4

[5] On Monday, 28 January 2019, RM had been at school. At about 8.00pm he left home to go for a walk in Fernieside Park. He was attacked from behind as libelled by two men who searched him and stole his mobile phone and cigarettes. He was forced to reveal the password for the phone. In the evening of 3 February, GS was in the McDonalds at Cameron Toll. He was asked outside by Aron McMillan and Mr Brown and attacked by them. The trial judge comments on the brutality of the attack, as shown on CCTV, by Mr McMillan. On 5 February, two security officers at the shopping centre noticed a group of boys and girls pushing themselves around in shopping trolleys. Mr McMillan and Mr Brown assaulted them as libelled.

Charge 5

[6] Alasdair Forsyth was aged 67. He lived in a second (top) floor flat. He generally left his door unlocked. He was of an eccentric nature and had few friends. CD was the aunt of Mr Elliott and Mr McMillan. She lived across the road from the deceased in a ground floor flat. At 10.00pm on 21 February, all three appellants were in her flat. Mr McMillan and Mr Brown had been there for their dinner. Mr Elliott had, unexpectedly, come with them.

He had previously left a bag of tools there. Mr Elliott repeatedly asked CD if the deceased "had money in his books". He had done this before over the previous months. Mr McMillan was "pretty gone". Mr Elliott said to the other two: "are we going to do that job". They then left the flat.

[7] The three had gone to the deceased flat and attacked him. As they left the deceased's flat, the police arrived and arrested them. Mr McMillan had been bare chested and had the deceased's blood on his hands. He had escaped the clutches of the police, but only temporarily. He said that he had just been in the close to split up a fight. Mr Elliott and Mr Brown had the deceased's blood on their clothes and footwear. Mr Elliott said that "this is all over my sister who got locked in the stairwell. The tools I had were for bikes…". Later that night he said that he had been the last to arrive at the flat and had tried to stop the other two. A screwdriver, a wrench, a hammer and Mr Brown's mobile phone were found in the close. Mr McMillan had had a tablet computer in his possession with the deceased's blood on it. Forensic science suggested that picture frames, a broom and a walking stick, as well as the wrench and hammer, had been used to attack the deceased. The deceased had a total of 80 injuries. The cause of his death was blunt force trauma to the chest.

[8] At interview, Mr Elliott said that he had been the last to arrive in the deceased's flat. He had tried to stop the other two. He denied having a weapon but later told his mother that he had had the wrench although he had not used it. Mr McMillan and Mr Brown made no comment. In a subsequent phone call from detention, Mr McMillan has said that "it wiz fur money". The plan had not been to attack the deceased. However, they were all "oot our nut" and just "flew in and started setting about him". Only Mr Brown testified. He said that Mr Elliott had attacked the deceased. Mr McMillan had not done anything. He and Aron McMillan had searched the house; stepping over the deceased's body.

[9] The trial judge took the view that Mr Elliott had been the "leader of this gang of thugs".

Mitigation

[10] Mr Elliott was 19. He had had a troubled background and had latterly had poor mental health with previous episodes of self-harm and attempts at suicide. He had been convicted of hamesucken at the age of 15 and received a Community Payback Order, which he breached. Mr McMillan was 17. He too had had a troubled childhood. He had been in care until 6 months before the murder. Violence was a feature of his life. Levi Brown had been 15 at the time of the murder. His parents were chronic substance abusers. He had been brought up by relatives. He had ADHD, which had been diagnosed when he was 9. He had attempted suicide while on remand.

[11] In selecting the punishment part for Mr Elliott, the trial judge took his age into account. He considered that there were several aggravating factors. First, as well as being the oldest of the three, he was the prime mover and leader of the group. Secondly, the murder was committed in the course of a planned robbery in which weapons were taken to commit the crime. Thirdly, the murder involved an attack on a vulnerable and innocent man in his own home. Fourthly, the violence was merciless and excessive. Fifthly the previous conviction of Mr Elliott for hamesucken had also involved the home of a pensioner. He had other convictions for dishonesty, drug taking, disorder and violence. Sixthly, Mr Elliott had lied about his involvement and had shown no remorse. Finally, he was under supervision at the material time.

[12] In relation to Mr McMillan, while the trial judge took account of his age, he also had regard (as he was bound to do: Prisoners and Criminal Proceeding (Scotland) Act 1993,

s 2(2)(a)) to the other convictions for assault and robbery. As with Mr Elliott, the planned robbery aspect of the murder and the level of violence on a man in his own home were aggravating features. Weapons had been carried and used. Although he had no previous convictions because of his age, Mr McMillan had a history of violence as set out in the Criminal Justice Social Work Report. He was also on bail at the material time. The judge took note of the punishment parts in *Kinlan and Boland* 2019 JC 193, where there was no pre-planning or the use of weapons, and that in *Mitchell* v *HM Advocate* [2010] HCJAC 54. Although this was not a stabbing, it was as bad a murder by stabbing.

[13] The trial judge took similar features into account in selecting the punishment part for Mr Brown. These included the other convictions, the planned nature of the robbery, the attack on a man in his own home, the level of violence and the weapons carried and used. Although the youngest, Mr Brown also had a history of disorderly behaviour, drug taking and violence. He was the subject of a supervision order at the time. He had shown a lack of insight and victim empathy. *Kinlan and Boland* (*supra*) and *Mitchell* v *HM Advocate* (*supra*) again feature in the judge's reasoning.

Submissions

Mr Elliott

[14] The contention was that the punishment part was excessive. The exercise of sentencing a child or young person was different from that of an adult (*Hay* v *HM Advocate* [2020] HCJAC 30 at para [21]). Mr Elliott was in an acknowledged category of "young adult" (*Green* v *HM Advocate* 2020 JC 90 at paras [80] – [82] citing *Kinlan and Boland* v *HM Advocate* (*supra*) at para [1]). The origins of the modern approach to the sentencing of young offenders stemmed from *Kane* v *HM Advocate* 2003 SCCR 746 (at para [11]). Retribution and

deterrence are not the only material considerations (see *Hay* v *HM Advocate* (*supra*) at paras [14] *et seq.*, citing in addition *H* v *HM Advocate* 2011 JC 149, *Campbell* v *HM Advocate* 2020 JC 47 and *McCormick* v *HM Advocate* 2016 SCCR 308).

[15] The trial judge had afforded insufficient weight to the youth of the appellant and his troubled background. Mr Elliott and his family were known to the local social work department. His parents' relationship was characterised by violence, domestic abuse, substance misuse and poor mental health. He had had insufficient care as an infant and was later the subject of compulsory measures of care. He had poor mental health.

[16] The trial judge had erred in imposing a lengthier punishment part than those of the other appellants. There was no evidence that he had been the principal actor. CD had been hostile to Mr Elliott and her testimony, about him bringing tools to her flat and asking if the deceased had money, had been contradicted by other evidence. The tools were irrelevant because it was well known that the deceased never locked his door and there was no need to break in. CD had never been in the deceased's flat and would not have known anything about there being money there. The appellant had been to the flat and was a friend of the deceased. There was objective evidence that the appellant had been a moderating influence in the McDonald's incident. There was no evidence that age had played a part in the attack.

Mr McMillan

[17] It was submitted that the punishment part was excessive having regard to three factors. First, Mr McMillan was only 16 at the time of the offence. The Scottish Sentencing Council: *Sentencing young people – Draft sentencing guideline* recognised that a different approach was required when sentencing young persons because of their lack of maturity and greater capacity to change. Mr McMillan had a greater ability to rehabilitate himself

than an adult offender. Secondly, the Criminal Justice Social Work Report revealed that Mr McMillan had accepted responsibility and expressed remorse. Thirdly, Mr McMillan's troubled background required to be given weight. At the time of the offence, Mr McMillan was an extremely damaged person. He had experienced several adverse childhood experiences including: being aged 5 when his home was attacked and the fan lights smashed by golf club wielding men who removed his father; taking part in an assault being perpetrated by his father and uncle on a man in a car when he was seven, this resulting in his father being sentenced to 6 years in jail; and being the subject of compulsory measures of care and moved thirteen times from one environment to another (eg institution to foster care) before being left on his own at the age of 16. Mr McMillan had acknowledged that he had "no boundaries and no life". He had significantly lacked intellectual and emotional maturity as a consequence of his upbringing. He had also been abusing Valium at the time.

Mr Brown

[18] Once again, the contention was that the punishment part was excessive standing, in particular, Mr Brown's age. The court had to have regard to the best interests of Mr Brown, as a child, as a primary consideration as well as the desirability of the child's reintegration into society (*McCormick* v *HM Advocate* (*supra*) at para [4]). Even the most heinous crime was not necessarily evidence of an irretrievably depraved character. The important aim of any sentence would be to promote the process of maturation, the sense of responsibility and the growth of a healthy adult personality and identity (*ibid* citing *R (Smith)* v *Secretary of State for the Home Department* [2006] 1 AC 159). Mr Brown was entitled to be given the opportunity to make something of his life. So far, he had had no normal life at all. His parents were drug abusers. He had been born suffering the effects of this. He had been brought up by

relatives. He had developed ADHD by the age of 9. He has signs of Post Traumatic Stress Disorder. He suffered from depression and had attempted suicide.

Decision

[19] In selecting comparative sentences for the appellants, the trial judge was entitled to take into account his own interpretation of the evidence given, in so far as consistent with the jury's verdict. He was thus able to find that the leader of the group was Mr Elliott, based partly upon his age relative to the others and to CD's evidence, which he was entitled to accept despite the criticisms made of it.

[20] When sentencing any offender to a period of imprisonment for a serious criminal offence, the court will normally have regard, when selecting a substantial custodial term, to the prospects of successful rehabilitation (Scottish Sentencing Council: *Principles and purposes of sentencing*, at para 5). Where there has been a conviction for murder, the sentence is either detention or imprisonment for life. It is not possible to modify that penalty. In setting the punishment part, the focus is on determining a period which satisfies "the requirements for retribution and deterrence" (Prisoners and Criminal Proceedings (Scotland) Act 1993, s 2(2)). The issue of rehabilitation does not directly impact on the punishment part (*Rizzo* v *HM Advocate* [2020] HCJAC 40, LJG (Carloway), delivering the opinion of the court, at para [17]).

[21] When selecting a punishment part, the court does have to have regard to the issue of culpability. It is well recognised that, because of their lack of maturity, the degree of blame to be attributed to a younger person or a child may be less than that of adults who have committed similar crimes (*Green* v *HM Advocate* 2020 JC 90 LJG (Carloway), delivering the opinion of the court, at paras [80] – [82], followed in *Hay* v *HM Advocate* [2020] HCJAC 30 at para [23], LJC (Dorrian), delivering the opinion of the court, at para [23]). In the case of a

child, his or her best interests must also be regarded as a primary consideration (*McCormick* v *HM Advocate* 2016 SCCR 308, LJC (Dorrian), delivering the opinion of the court, at para [4], followed in *Kinlan and Boland* 2019 JC 193, LJG (Carloway), delivering the opinion of the court, at para [18] and referring to the UN Convention on the Rights of the Child Art 3(1)).

[22] Given the brutal nature of this murder of a vulnerable person in his own home using extreme violence in pursuit of a pre-planned criminal objective, the punishment parts would, irrespective of the ages of the perpetrators, require to be substantial in the case of all three appellants. The previous convictions of Mr Elliott and the findings of guilt on the other charges, and their own Children's Hearing appearances, in respect of Mr McMillan and Mr Brown were correctly identified by the trial judge as aggravating factors. On the other hand it must be recognised that the degree of blame should be tempered by the troubled backgrounds to which all three appellants were subjected.

[23] Balancing all of these factors, the court is persuaded that the trial judge has placed insufficient weight on the youth of the appellants and their backgrounds and that the punishment parts selected were accordingly excessive. This is especially so in the case of the child offenders. The court will quash the punishment part of 18 years imposed on Mr Elliott and substitute one of 16 years. It will quash the punishment parts of 17 years and 3 months for Mr McMillan and 17 years for Levi Brown and substitute punishment parts of 13 years.