APPEAL COURT, HIGH COURT OF JUSTICIARY

[2019] HCJAC 84
HCA/2019/000306/XC

Lord Brodie
Lord Drummond Young
Lord Turnbull

OPINION OF THE COURT

delivered by LORD BRODIE

in

APPEAL AGAINST SENTENCE

by

CALLUM DAVIDSON

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: McConnachie QC, Crowe; Faculty Services Limited
Respondent: Prentice QC (sol adv) AD; Crown Agent

15 November 2019

Introduction

[1] The appellant is Callum Davidson. He was born on 8 March 1995. On 1 April 2019 he went to trial along with two co-accused, Steven Alexander Dickie and Tasmin Glass, on an indictment containing seven charges, charge (7) being a charge of murder. In the course of the trial the advocate depute withdrew the libel in respect of charges 1 to 6. On 3 May

2019 the appellant was convicted by a majority of charge (7), as amended by deletion of the words "whereby he was incapacitated" and subject to the deletion by the jury of the words "him and to". The charge in respect of which the appellant was convicted was accordingly in the following terms:

> "(007) between 6 June 2018 and 7 June 2018, both dates inclusive, at The Peter Pan Childrens Play Park and Loch of Kinnordy Nature Reserve Car Park, both Kirriemuir, Angus you STEVEN ALEXANDER DICKIE, CALLUM DAVIDSON AND TASMIN GLASS did assault Steven Andrew Donaldson, born 23 July 1990 and did arrange to meet him at said Peter Pan Play Park with the intention of assaulting him and once there did repeatedly strike him on the head and body with unknown instruments …, and thereafter did transport him to the aforesaid Loch of Kinnordy Nature Reserve Car Park, where you did repeatedly strike him on the head and body with a knife and a baseball bat or similar instruments and repeatedly strike him on the head and neck with an unknown heavy, bladed instrument and did set fire to … his motor vehicle, registered number S73 VED and you did murder him."

[2] The first accused, Steven Alexander Dickie ("Dickie"), was also convicted, by a majority verdict, of the murder charge, subject to the same deletion as for the appellant. Tasmin Glass ("Glass"), the third accused, was unanimously convicted of culpable homicide, again subject to the same deletion.

[3] The trial judge adjourned the diet of sentence in respect of the appellant and his co-accused for the purpose of obtaining criminal justice social work reports. At the adjourned diet on 30 May 2019 the trial judge imposed sentences of imprisonment for life on Dickie and on the appellant. He made the punishment part 23 years for Dickie and 24 years for the appellant.

[4] The appellant appealed against conviction and sentence. Leave has been refused in respect of conviction but granted in respect of sentence. The contention on behalf of the appellant is that a punishment part of 24 years was, in all the circumstances excessive and that therefore there had been a miscarriage of justice.

Evidence at the trial

[5] The trial judge reports that the evidence led at trial was to the following effect.

Background

[6] The deceased, who was 27 years of age at the time of his death, worked in the offshore oil and gas industry, both in the North Sea and in other parts of the World. He was successful in his career and earned a good salary. He owned a number of properties, which he rented out, and several vehicles. The deceased and Glass had been in a sexual relationship since about the autumn of 2017, but by June 2018 the relationship had become strained. Unknown to the deceased, Glass had begun a sexual relationship with Dickie, whom she knew from the village of Kirriemuir. The deceased had been pressing Glass for repayment of money she owed him from an insurance settlement for a car (a Volkswagen Scirocco) she had written off in an accident; the deceased had previously bought the car for Glass as a gift. There was evidence that Glass was in financial difficulties at the time of the murder. Unknown to her parents, she had borrowed money from her grandparents. She had fallen behind with her rent for a flat in Glasgow. She had also borrowed money from her employer, Lee Wright. Glass was pregnant with the deceased's child, although he was unaware of this.

The murder

The early part of the evening of 6 June 2018

[7] During the early part of the evening of 6 June 2018 the three accused and the appellant's partner, Claire Ogston, went swimming at the river in Cortachy, a short distance outside Kirriemuir. In the course of the evening Glass received a series of text messages

from the deceased in which he asked her about the future of their relationship and said that he wanted to see her that night. The evidence showed that Glass became unhappy and, at a later stage, angry about the fact that the deceased was persistently contacting her. When Dickie became aware that the deceased was in touch with Glass, he reacted jealously. This occurred when the three accused and Ogston were at the car park at the Peter Pan play park in Kirriemuir later in the evening, following the swimming trip.

[8] There was evidence that the appellant made a phone call to an associate, Colin Chalmers, in which he asked for assistance in the form of "back up" because the deceased was coming from Arbroath to Kirriemuir that night with "a squad of boys". In one of her statements to the police Glass said that the appellant told Chalmers that they were going to give the deceased a "hiding".

[9] Later that evening Glass drove the appellant and Ogston in Glass's car to the home of the appellant's cousin, Michael Davidson, in Kirriemuir. Whilst there, the appellant collected a baseball bat. The appellant said in his evidence that it was Dickie who had urged him to obtain the bat. Immediately after the baseball bat had been uplifted from Michael Davidson's house, Glass drove the appellant and Ogston to 19 Marywell Brae, Kirriemuir where the appellant and Ogston lived. The baseball bat was in the car, as all the car's occupants must have been aware.

Events later in the evening of 6 June 2018

[10] At Marywell Brae the appellant, Glass and Ogston were soon joined by Dickie; he had travelled there on his motor cycle from the Peter Pan play park. Glass told the others that she had arranged to meet the deceased at the Peter Pan play park later that night. Ogston, whose evidence was an important strand in the prosecution case, said that Glass

looked at Dickie and asked if he would be able to deal with it. A look was then exchanged between Dickie and the appellant; Ogston described this as a "would you come with me sort of look".

[11] Shortly after this, Glass, the appellant and Dickie left the house together in Glass's car. Glass was driving. The baseball bat was in the car, as each of them must have been fully aware. There was also evidence from Ogston that Dickie took a knife with him from the house. They drove to a street in Kirriemuir where a Ford Ranger truck belonging to the appellant was parked. The appellant and Dickie alighted from Glass's car and went to the truck. It is reasonable to infer that the purpose of their doing so was to collect another weapon to be used in assaulting the deceased.

[12] A short time later, Glass dropped off the appellant and Dickie near to a path that led up a hill to the Peter Pan play park. Glass drove to the car park at the Peter Pan play park where she met the deceased, as had previously been arranged between them. He was in his white BMW car. At about 23:05 Glass telephoned Dickie, it being a reasonable inference that she did so to let him know that she was in the car park with the deceased. A short time thereafter Dickie and the appellant arrived on foot and attacked the deceased in his car. The appellant admitted punching the deceased at this point and it is probable that either he or Dickie stabbed the deceased. They managed to overpower him and forced him into the back seat of his car. This was the first stage of the murderous attack on the deceased. At this point Glass drove home to her parents' house in Kirriemuir, arriving there at about 23:10.

[13] The appellant and Dickie then drove the deceased in his car to the nature reserve car park at Loch of Kinnordy, on the other side of Kirriemuir. There they jointly attacked the deceased with the baseball bat and with other weapons.

The injuries to the deceased

[14] The pathologists found a substantial number of stabbing and incised wounds on the deceased's head and neck. There were at least six chop-like incised wounds over the back of the head and the rear of the upper neck. These had divided the cervical spine and the spinal cord in two places. The injuries were likely to have been inflicted by a heavy long-bladed, keen-edged instrument of sufficient rigidity to cut bone easily. It is reasonable to infer that these injuries were inflicted by the weapon that the two men had collected from the Ford Ranger. There was also a laceration on the back of the deceased's head. The left side of the deceased's jaw was fractured. The expert evidence was that these injuries were the result of blunt force trauma.

[15] Neuropathological examination of the brain identified bleeding over the surface of the brain and focal areas of bleeding within an area of the brain towards the back of the head. These injuries were in keeping with diffuse traumatic brain injury. There were deeply incised wounds to each hand; these were defensive injuries.

[16] There were eight stab wounds to the torso, two of which had penetrated the chest cavity and caused minor injuries to the left lung. One of these had penetrated the abdominal cavity, but had not caused any internal injury. There were a further six stab wounds to the left thigh.

[17] Death was attributed to sharp force injuries to the neck. The sharp force injuries associated with transection of the spinal cord were judged to have been immediately fatal.

[18] A trail of blood found in the nature reserve car park suggested that the deceased had at one stage attempted to escape from his two assailants. Dickie and the appellant caught up with him at the entrance to the car park where blood and human tissue were later found. They violently assaulted him there and probably rendered him unconscious. A drag mark

on the car park surface indicated that the appellant and Dickie carried the deceased back to his car where he was killed. At some point his car was set alight. There was evidence of an acceleration mark, which could have been caused by Dickie's motor cycle, having been overlaid on top of the drag mark. It would have been open to the jury to infer from this mark that Dickie returned to the scene at a later stage that evening.

The aftermath of the murderous attacks

[19] Ogston, a remarkably composed young woman who at the time of the trial remained in a close relationship with the appellant, gave evidence that on his return to the house at Marywell Brae Dickie had a shower. She noticed that he was a very grey colour. He was jumpy and on edge. He admitted to Ogston that he had hit the deceased with the baseball bat in an argument that had got out of hand. The bat had broken into pieces. According to Ogston, Dickie asked the appellant to go out again to find the broken bits of the bat. The appellant duly did so, but he did not return to the house with anything. Ogston said that she saw Dickie remove a small black-handled vegetable knife from the jacket he and been wearing. The knife came from the house at Marywell Brae. Ogston noticed that its blade was bent; she said that it had not previously been damaged in this way. The witness said that the appellant had a small scratch on his nose; this had not been there before he and the others had gone to meet the deceased. When he had returned later that night, the appellant had appeared worried. She saw him washing his hands in the sink. The following morning Ogston noticed that the two men had washed their clothes in the washing machine.

[20] The Crown led CCTV evidence showing two men in the car park of the Kirriemuir Health Centre at a time which was consistent with them walking from the nature reserve car

park back to the house at Marywell Brae, having carried out the murderous attack on the deceased.

Scientific evidence

[21] There was substantial scientific evidence against the appellant. There was a fingerprint mark in blood on the handle of the baseball bat that was later recovered by the police from a field near the nature reserve car park. The mark was found to be that of the appellant's left middle finger. Blood stains were found on the lower back of the blue T-shirt worn by the appellant; a small spot of this matched the deceased's blood. A mixed DNA profile from the deceased and from the appellant was identified on the left and right handle grips of the push bike used by the appellant. He had taken the push bike from the house at 19 Marywell Brae when he left to look for the broken baseball bat.

Incriminating statements

[22] There was, in addition, evidence that the appellant had made a number of incriminating statements in the aftermath of the murder. On 7 June 2018 Jamie Stewart heard him say that there had been a carry-on at the park and that a baseball bat had been snapped over the person's head with one swing. The appellant also said that he had punched the deceased. Stewart heard the appellant say that he had taken away the weapons to get rid of them at his grandmother's farm. He said that they had left Glass's father to deal with it afterwards and to get rid of the body.

[23] Ciaran Howcroft, a cousin of the appellant's, gave evidence that he asked the appellant on 7 June whether he had anything to do with the killing. The appellant had replied, as a joke according to Howcroft, that the boy's car had been a fine car to drive.

[24] There was also evidence that the appellant had conducted searches on the internet for weapons; these included knives and a 24 inch machete.

The evidence of the three accused

[25] Dickie's position when he gave evidence at the trial was that he played no part in any attack on the deceased. Whilst he had gone with the appellant to the Peter Pan play park, it was the appellant who had run ahead, got into the deceased's BMW car through the driver's window and then departed in the BMW, which was apparently being driven by the deceased, although Dickie could not actually see who was driving. There was no plan to kill the deceased. The appellant was simply going to give him a roughing up and that was to be the end of it; the idea was simply to make the deceased back off. Dickie claimed that he had not gone to the nature reserve car park at all. He had given his mobile phone to the appellant when Glass phoned and asked to speak to the appellant as they were making their way up the hill towards the Peter Pan play park. Dickie insisted that he had not played any part in the murderous assault on the deceased or that he had been, to any extent, party to a concerted plan to murder him.

[26] In his evidence the appellant accepted that he had punched the deceased by reaching into the BMW at the Peter Pan play park, but he claimed that this was all that he had done. It was, according to the appellant, Dickie who had brought the baseball bat with him. Dickie had violently attacked the deceased in his car with a knife. He then wrestled him into the back of the car. The appellant, at the urging of Dickie, then drove the BMW to the nature reserve car park, sitting in the driver's seat in a hunched-forward manner. During the drive Dickie punched or stabbed the deceased. When they got to the car park the appellant

played no part in any further assault on the deceased. He made his way promptly from the scene.

[27] So far as the evidence of Tasmin Glass was concerned, she said that she was unaware at all times that either of her co-accused had a weapon of any sort or that there was any reason to suppose that either of them might use violence towards the deceased. She explained that she had not taken seriously what she accepted that she heard the appellant say to Colin Chalmers in the phone call. In the house at 19 Marywell Brae, Glass asked Dickie if he would be able to speak to the deceased in the event that she and the deceased started to argue. That is as far as any discussion or conversation she had with Dickie had extended. She did not, she said, suggest or encourage or imply to Dickie, far less instigate him, to use violence against the deceased. Glass went on to say that in fact she did not meet the deceased anywhere on the night of 6 June; in particular at the Peter Pan play park car park.

[28] The jury clearly did not accept the evidence of any of the accused in so far as it was material to exonerate them from, in the case of the appellant and Dickie, the murder of the deceased, and, in the case of Glass, his culpable homicide.

The trial judge's approach to fixing the punishment part of the sentence

[29] As required by section 205 of the Criminal Procedure (Scotland) Act 1995 the trial judge sentenced the appellant to imprisonment for life. He was accordingly further required to make an order in terms of section 2(2) and (3) of the Prisoners and Criminal Proceedings (Scotland) Act 1993 specifying the punishment part of the sentence, taking into account the seriousness of the offence and the appellant's previous convictions, but ignoring any period of confinement which might be necessary for the protection of the public.

[30] The trial judge reports that the evidence at the trial, the information contained in the social work report, and his own impression of the appellant left him in no doubt that the appellant has an exceptionally violent and dangerous personality. As between him and Dickie, the trial judge believed that the appellant was probably the more dominant.

[31] In setting the punishment part for each of the appellant and Dickie the trial judge further reports that he took account of a number of what he considered to be seriously aggravating factors. First, there was the extreme violence used in the attack on Mr Donaldson. Second, the appellant and Dickie had armed themselves with a variety of weapons, including a baseball bat, a knife or knives and, it could be inferred, another weapon in the nature of a cleaver or axe. Third, the violence used was sustained and prolonged. The attacks were carried out in two different locations. Initially, the appellant and Dickie had overpowered the deceased at the Peter Pan play park; then they abducted him in his vehicle to the car park at the Kinnordy Loch Nature Reserve. There they renewed their assaults on him with unrestrained ferocity. The deceased tried to escape and to defend himself, but the appellant and Dickie cut him down without mercy, severing his spinal cord in two places with a deadly weapon. They then left his body next to his car, which they set alight. The fourth factor, in assessing the gravity of the appellant's and Dickie's criminality, was that the deceased had done neither of them any harm whatsoever. He had come to Kirriemuir that evening to meet Glass in order to discuss their relationship and to try to address certain aspects of it. At her request and instigation the appellant and Dickie had readily agreed to attack him. They quickly formulated a plan to assault the deceased when he was with Glass at the play park; they carried out the plan with ruthless determination. That was the fifth aggravating feature: their planning and premeditation. Taking all these factors into account, it was the trial judge's view that the level of the appellant's and Dickie's

culpability was at the high end of the spectrum. Accordingly, the public interest demanded that they be severely punished. It was necessary also that a clear signal was given that the use of weapons for violent purposes would be met with heavy custodial sentences. The trial judge also took account of the respective previous records of offending of the appellant and Dickie. These showed that both had a propensity to resort to violence. Over and above the circumstances of the murderous attack on Mr Donaldson, there had been evidence at the trial that each had been willing to deploy violence and threats to achieve their aims and to settle perceived grievances. The appellant had a somewhat more serious record of previous offending than Dickie; in particular, he had been convicted in 2017 of assault to severe injury and permanent disfigurement and had been sentenced to 6 months imprisonment. Finally, the trial judge took into account the information in the criminal justice social work reports. Neither the appellant nor Dickie had evinced any genuine remorse, empathy or insight into their crimes. The appellant had been recorded by the author of the report as having shown a callous disregard for the deceased's family. The trial judge concluded that both accused were cold-blooded, violent and unrepentant murderers.

[32] In the case of the appellant the trial judge fixed the punishment part of his life sentence at 24 years. In the case of Dickie, taking account of his somewhat less serious record of previous offending, the punishment part was fixed at 23 years. The sentences of life imprisonment were backdated to 18 June 2018.

Grounds of appeal and supporting submissions

[33] In opening his submissions on behalf of the appellant Mr McConnachie QC acknowledged that the cases of *R (Smith)* v *Secretary of State for the Home Department* [2006] 1 AC 159 and *McCormick* v *HM Advocate* 2016 SLT 793 which had been cited in the written

submission for the appellant were of no relevance to the instant matter, dealing as they do with the circumstances of juveniles; these were not circumstances applicable to the appellant who was 23 years of age at the date of the offence. Mr McConnachie accepted that having regard to the verdict of the jury and the circumstances of the offence including the level of violence detailed by the trial judge in his report that a significant punishment part required to be imposed but notwithstanding that it was Mr McConnachie's submission that 24 years was an excessive period. While no longer a youth, the appellant was still a relatively young man but he will be 48 before he can be considered for release on licence. The period necessary to achieve the aims of punishment and to secure the maximum benefits of education and rehabilitation will have passed before then. While the court has emphasised on a number of occasions that each case depends on its own circumstances and that only limited guidance can be drawn from the sentences imposed in other cases, relatively speaking, a 24 year punishment part was very substantial. While Mr McConnachie conceded that the tendency since the decision in *HM Advocate* v *Boyle* 2010 JC 66 has been to impose rather longer punishment parts than would be suggested by the guidance offered in that case, 24 years was very much longer than the 16 years minimum for murder using a knife indicated at para [16] in *Boyle*.

[34] Mr McConnachie drew attention the positive features of the appellants' circumstances. He had a good record of employment and enjoyed a steady relationship with his partner and their daughter who was born after the offence. They have visited him in prison where he has been in custody since 18 June 2018 and where he has earned the privilege of being made a passman. The appellant also had a son from a previous relationship. The criminal justice social work report had given too much attention to what was said to be the appellant's lack of sincere remorse. At trial the appellant had given

evidence as to a version of events which had been rejected by the jury. It would be unusual for a convicted person to depart from a position taken in his evidence after what was only a short period after trial; were he to do so it might reasonably be considered to be a very shallow response. His position remains that his responsibility is limited to what he spoke to in evidence. The appellant may have an unenviable record of previous convictions but they mostly relate to road traffic offences and the only custodial sentence which has previously been imposed was one of 6 months' imprisonment.

Decision

[35] We have not been persuaded that a punishment part of 24 years is excessive in the circumstances of this case.

[36] Mr McConnachie was right when he said that the courts have emphasised that the circumstances of particular murders are so various and the subject matter so fact-specific that only limited assistance can be gained by attempting to compare one case with another (see eg *Campbell* v *HM Advocate* 2019 SLT 1127 at para [30]). The range of punishment parts that have been upheld on appeal is a wide one (see *Jakolev* v *HM Advocate* 2011 SCCR 608 at para [10]). A court of five judges was convened in *HM Advocate* v *Boyle* with a view to the court pronouncing an opinion on the level of the punishment part that might be appropriate in a similar case, as is provided for in section 118(7) of the 1995 Act, but, as the Lord Justice General observed in *Kinlan and Boland* v *HM Advocate* [2019] HCJAC 47 at para [17] the level of punishment parts has risen substantially beyond the guideline figures suggested in *Boyle*. Nevertheless, although a punishment part of 24 years can be said to fall at about the half-way point in the range indicated by previous decisions of the court, we would accept, as Mr McConnachie submitted, that 24 years is a substantial period of time to serve in

custody before there can be any question of release on licence. It is a period appropriate to the more serious, albeit not the most serious, cases of murder.

[37] This, in our opinion, was such a case. The trial judge in his sentencing statement described the degree of the appellant's culpability as at the high end of the spectrum. We see no reason to disagree with that. Now it may be that the attack on the deceased was not a long time in the planning; a matter of hours perhaps rather than any longer, but it was undoubtedly premeditated and coordinated. At the instigation of Glass, the appellant and Dickie armed themselves with lethal weapons collected from at least two locations. The deceased, who had done no harm to any of the co-accused, was lured to the Peter Pan play park by Glass where he was ambushed by the appellant and Dickie who assaulted him using extreme violence. That violence was sustained and prolonged. It involved driving the deceased to another location, the Kinnordy Loch Nature Reserve, where, despite the deceased's attempt to escape, he was further assaulted and killed. The deceased sustained a fractured jaw, no less than 14 stab wounds and a further six incised wounds over the back of the head and the rear of the upper neck. His spinal cord was severed in two places. His body was left by his car which was set alight.

[38] Mr McConnachie said all that could be said for the appellant but the appellant could not be described as a person of previously good character. He had been convicted of assault to severe injury and permanent disfigurement. The trial judge had heard evidence about the appellant's behaviour before the murder which had allowed him to conclude that the appellant was a violent and aggressive thug.

[39] The appellant has demonstrated no victim empathy or remorse. The author of the criminal justice social work report viewed him as displaying a callous disregard for the impact of his actions. Deeply unattractive as this is, Mr McConnachie may be correct to

caution against attaching weight to this as aggravating what is already a very serious offence. However, what can be said is that there is nothing by way of mitigation in the appellant's attitude to what the jury found him to have done.

[40] The appeal against sentence is refused.