



APPEAL COURT, HIGH COURT OF JUSTICIARY

[2021] HCJAC 40  
HCA/2021/000168/XC

Lord Pentland  
Lord Doherty

OPINION OF THE COURT

delivered by LORD DOHERTY

in

APPEAL AGAINST SENTENCE

by

COLIN MARSHALL

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

**Appellant: A Ogg (Sol Adv); Gilfedder and McInnes**  
**Respondent: Prentice QC (Sol Adv) AD; the Crown Agent**

17 August 2021

[1] The appellant is now aged 35. He was convicted after trial of three offences of violence committed on 19 and 20 May 2020. The victim in charges 1 and 3 was his friend, Calvin Whorlow. The appellant was heavily intoxicated with alcohol at the time of the offences involving Mr Whorlow. Charge 1 was an assault to injury involving repeated punching of Mr Whorlow's head, knocking him to the ground, and rendering him unconscious. Charge 2 was an aggravated assault to injury on Ms Hornby, whom the jury

found was the appellant's partner at the time, by punching her to the head and body, and pushing her causing her to fall down stairs. By far the most serious offence was charge 3, the attempted murder of Mr Whorlow. That assault involved repeatedly punching Mr Whorlow's head and body and stabbing him in the neck with a knife, all to his severe injury, permanent disfigurement, and to the danger of his life. After the attack Mr Whorlow was left unattended, unconscious and bleeding, in the common close outside the appellant's flat. It was only by good fortune that he was discovered by police officers soon after and an ambulance was summoned. The penetrative injury to Mr Whorlow's neck was in an area carrying major blood vessels and it was fortuitous that no major vessel was cut. Had one been cut it is more likely than not that Mr Whorlow would have bled to death. In fact, the actual injury sustained to his neck would not have resulted in death through bleeding even if medical attention had not been obtained when it had been. The laceration was 2.5cm in width and of uncertain depth. It did not require suturing and it was closed by using a steristrip.

[2] The appellant has 34 previous convictions (between 2002 and 2020) encompassing 80 offences. Ten of those offences were for assault, of which one was for assault to severe injury, one was for assault to injury and robbery, and several were for assault to injury and assault causing actual bodily harm. He has committed two domestically aggravated offences. He has convictions for abduction, and for culpable and reckless fire-raising, and he has numerous convictions for assaulting or impeding the police. He has had many custodial sentences, the lengthiest of which was 18 months. His longest sentences for crimes involving violence were 15 months for assault to injury and robbery, 9 months for assault to severe injury, and 182 days for assault. He has also been convicted of several serious breaches of

the peace, some of them aggravated, for which he has received custodial sentences of up to 12 months' imprisonment.

[3] The Criminal Justice Social Work Report ("the CJSWR") assessed the appellant as having a very high risk of reoffending. Numerous risk factors were identified. There were no protective factors.

[4] It is not in dispute that the trial judge was right to conclude that an extended sentence was necessary. He imposed a *cumulo* extended sentence of 18 years, with a custodial part of 12 years and an extension period of 6 years. The factors which influenced him most were the gravity of the attempted murder conviction, the appellant's record and the high risk of further offending, and the need to protect the public.

[5] Ms Ogg submits that the sentence is excessive, for three reasons. First, while the assault with the knife created a potential danger to life, in fact the neck injury sustained was not life-threatening and had been relatively minor. The sentence imposed was more appropriate to cases where the injury inflicted had in fact endangered life. Second, while the appellant has a lengthy record of previous convictions none of them had been in the High Court. None was for crimes of violence of anything like the gravity of the attempted murder conviction, and none of them had resulted in a sentence of more than 18 months imprisonment. The sentence imposed here had been too great a leap from the previous sentences. Third, the CJSWR suggested that the appellant was not predatory and that he did not seek out opportunities to use violence. Rather, in large part his violence was a disproportionate response to personal difficulties when under the influence of alcohol. The report also suggested that the appellant had some insight into the causes of his offending and that he was motivated to try and change. He was aware that unless he changed he ran

the risk that he might kill someone in the future. He had behaved well in prison where he worked in a trusted position. A lesser sentence would achieve the purposes of punishment and rehabilitation.

[6] We emphasise that any attack on the neck with a knife requires to be viewed very seriously indeed. The attack here was wickedly reckless and the jury concluded that it was of a murderous nature. However, we accept that, fortunately, the laceration's consequences appear to have been relatively minor. We also accept that although the appellant has a lengthy record the attempted murder offence is very much graver than any crime of which he has previously been convicted. We recognise too that the author of the CJSWR saw at least some indications that the appellant may have some insight into his offending and that he may be amenable to working towards reducing the very high risk which he currently represents. That would be likely to involve acceptance that he abstains from alcohol, and probably also acceptance of the need for work to address personality traits which may be directly related to his impulsivity and violence. If there is to be progress it is likely to be very gradual (and the appellant's continued denial of responsibility for the charge 2 and charge 3 offences may prove to be an impediment to moving forward).

[7] Section 210A(2) of the Criminal procedure (Scotland) Act 1995 makes clear that an extended sentence is a sentence of imprisonment which is the aggregate of its two parts. It is important to view the extended sentence as a whole, comprising a custodial part followed by the extension period. We are in no doubt that the gravity of the offence of attempted murder, the appellant's record, and the risk of further offending all point to the need for a substantial extended sentence. However, we are satisfied that when due account is taken of the other factors which we have outlined it is evident that the totality of the extended

sentence which the trial judge imposed is excessive. In our view the appropriate *cumulo* sentence is an extended sentence of 15 years imprisonment with a custodial part of 10 years and an extension period of 5 years. Accordingly, we shall allow the appeal, quash the sentence imposed by the trial judge, and substitute that sentence.