

APPEAL COURT, HIGH COURT OF JUSTICIARY

[2023] HCJAC 34 HCA/2023/287/XC

Lord Pentland Lord Boyd of Duncansby

OPINION OF THE COURT

delivered by LORD BOYD OF DUNCANSBY

in

APPEAL AGAINST SENTENCE

by

JAMES DUNN

Appellant

against

HIS MAJESTY'S ADVOCATE

Respondent

Appellant: Neilson; John Pryde & Co Respondent: Miller, AD; Crown Agent

<u>29 August 2023</u>

[1] The appellant pleaded guilty at a first diet in the Sheriff Court to assault to severe

injury and permanent disfigurement and to possession of a knife contrary to section 49(1)

of the Criminal Law (Consolidation) Act 1995.

Circumstances of offending

[2] The appellant encountered the complainer in the street and asked him if he was giving evidence in a forthcoming trial, placing the complainer in a state of alarm. The appellant followed the complainer and lunged at him with a knife leaving him with a 10cm laceration from his left cheek at the ear lobe to his lower chin. He required 15 stitches and has been left with a permanent scar.

Sentence imposed

[3] The appellant is 23 years of age and consequently the *Sentencing Young People* guideline applied to him. The sheriff sentenced the appellant to an extended sentence of 8 years of which 4 years is the custodial part, reduced from 65 months to take account of the plea. The sheriff explains that he selected a *cumulo* headline sentence of 72 months before reducing it to 65 months to take account of the appellant's age at the date of sentencing. No appeal is taken against the imposition of an extended sentence, or its length. The consequence of a reduction in sentence, however, would mean that an extended sentence could not be imposed. In those circumstances Mr Neilson accepted that it would be appropriate for the court to make a supervised release order.

Submissions for appellant

[4] In support of the appeal Mr Neilson submitted that the headline sentence of 6 years was excessive. While prison was inevitable the starting point was excessive. It was acknowledged that the sheriff had made an allowance for the appellant's age. That was appropriate given the requirement to do so in the guideline. It did not however fully reflect the adverse childhood circumstances that the appellant had experienced. These

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were detailed in the criminal justice social work report. The appellant had had a remarkably difficult upbringing, characterised by chaotic parental lifestyles. His mother had problems of addiction. His father had been sentenced to a long term of imprisonment when he was only 4 years old. Social work had been involved with him throughout his childhood. The appellant was aware of the harm he had caused and was remorseful. There was scope for rehabilitation and he had shown a willingness to turn his life around. He had completed a City and Guilds course in mechanics and obtained a number of other training certificates. He has had mental health issues and problems with drug and alcohol addiction. The sheriff had not accounted for the appellant's lack of maturity and increased potential for long-term rehabilitation.

Analysis and decision

[5] The sheriff has clearly erred in his approach to the *Sentencing Young People* guideline. There is no warrant for assessing a headline sentence and then discounting the sentence as a result of his age. Nor has the sheriff explained why he selected 10% as an appropriate discount for age. While we see no difficulty, in appropriate cases, in indicating what sentence might have been imposed had the young person been an adult, the assessment of culpability for a young person does not involve a mere discounting exercise of an arithmetical nature. The correct approach, in our opinion, is to assess the seriousness of the offence having regard to the level of culpability and the harm. Culpability is assessed according to the young person's maturity and having regard to the factors outlined in paragraphs 10 to 12.

[6] The assessment of harm is not affected by the guideline. In this case it is very serious. The complainer was slashed across the face with a knife leaving him with a

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permanent scar. The harm, however, is not confined to the individual complainer. The offence was clearly designed to intimidate a witness in a criminal trial and accordingly strikes at the system of justice. The sheriff stated that he had considered a remit to the High Court. We are not surprised.

[7] So far as culpability is concerned, while the guideline applied to him, the appellant is nevertheless an adult. Although the court should not rely solely on age, there is no evidence that the appellant is less mature then others of his age. The appellant has a bad record of offending. He has accrued sixteen convictions since the age of 18. Four convictions are at Sheriff and Jury level for assault either to injury or severe injury and he has a number of convictions for possession of a weapon. Six convictions have resulted in custodial sentences. He was not deemed suitable for a community based disposal due to public protection issues and reservations about compliance with past orders. He is assessed as maximum risk of re-offending.

[8] In the appellant's favour the social worker comments that if he addresses his addiction problems the likelihood of re-offending will be reduced. It is to his credit that he has obtained qualifications and expresses a wish to turn his life around. So far, however, he has not taken any opportunity to address either his addiction problems or his criminal behaviour. While rehabilitation is a primary consideration in sentencing a young person there is little to suggest that the appellant at this point in his life is amenable to rehabilitation.

[9] The sheriff had regard to the report and took into account the appellant's personal circumstances including his adverse childhood experiences. He assessed the offences as having a high degree of both culpability and harm. He regarded the appellant as an

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extremely dangerous individual who posed a high degree of risk to the public. He rightly considered that in this instance the court's primary concern was protection of the public.

[10] While the sheriff erred in his approach to the *Sentencing Young People* guideline it was, if anything, in the appellant's favour. In all the circumstances we are not persuaded that the sentence was excessive.

[11] The appeal is refused.