APPEAL COURT, HIGH COURT OF JUSTICIARY

[2024] HCJAC 50
HCA/2024/451/XC

Lord Doherty
Lord Armstrong
Lord Beckett

OPINION OF THE COURT

delivered by LORD DOHERTY

in

the Appeal Against Sentence

by

COLIN KENNEDY

Appellant

against

HIS MAJESTY'S ADVOCATE

Respondent

Appellant: Cobb; John Pryde & Co, SSC
Respondent: Prentice KC (sol adv) AD; Crown

17 December 2024

Introduction

[1] On 7 August 2024 at the High Court in Glasgow the appellant was convicted of the following charge of murder:

> "…on 4 July 2021 at…Airdrie you COLIN KENNEDY did assault Catherine Stewart, born 6 December 1966, your partner, residing there, and did repeatedly strike her on the head and body with a knife and you did murder her and you did previously evince malice and ill-will towards her;

> and it will be proved in terms of section 1 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016 that the aforesaid offence was aggravated by involving abuse of your partner or ex-partner."

[2] The appellant was sentenced to life imprisonment with a punishment part of 25 years. In this appeal against sentence he maintains that the punishment part was excessive.

Background

[3] The deceased was the appellant's long-term partner. They brought up four children together. At the time of her death the deceased was aged 54. She had a past medical history of arthritis and of breast cancer. The latter condition had been treated with left-sided wide local excision in December 2018. She was prescribed regular medication. She used a walking stick because of her arthritis, but otherwise she had reasonable mobility.

[4] The relationship between the deceased and the appellant began to become strained in about September 2020. The appellant attributed this to a closeness which developed between the deceased and A, a son of the appellant from a previous marriage. The appellant and A had been estranged for many years. The appellant struggled to accept the bond between the deceased and A. There was very frequent social media and telephone communication between them, and there were trips by the deceased to stay at A's home in England. The appellant was unable to understand or accept this. He accused the deceased of having a sexual relationship with A, which she denied. He wanted the connection between them to end, but the deceased insisted that it continue. As a result, the relationship between the appellant and the deceased deteriorated, and before the murder it had broken down irretrievably. The deceased told the appellant to leave their home. He made arrangements to dispose of his belongings, but he stalled about moving out because he did

not want to live apart from their 17-year-old daughter, B. On the day of the murder the appellant and the deceased argued. She told him that there had been enough stalling and that he should leave right away.

The murder

[5] The murder took place in the kitchen of the family home on the morning of 4 July 2021 in the presence of B. The appellant attacked the deceased with a kitchen knife. The attack was a frenzied one involving severe force. He stabbed her from behind so forcefully that the blade bisected a rib and caused a fatal injury to her aorta. He then struck her chest, neck, and face with the knife. Some of these blows penetrated bone and struck vital organs. B pulled the appellant from the kitchen and went to get help from neighbours, at which point the appellant returned to the kitchen and continued assaulting the deceased. She sustained multiple defensive injuries to her hands and forearms, indicating that she remained conscious and aware of what was happening for at least some time after the initial fatal stab wound. The cause of death was stab wounds to the chest. Police attended to find the appellant bloodstained but calm. He told officers "It's murder, I killed my wife."

The trial

[6] At the trial the defence was that at the time of the killing the appellant suffered from a mental disorder in terms of section 51B(2) of the Criminal Procedure (Scotland) Act 1995, and so was guilty of culpable homicide, not murder, by reason of diminished responsibility.

[7] The appellant led evidence from Dr John Marshall, Consultant Forensic and Clinical Psychologist, that at the time of the murder he suffered from a psychotic illness - a delusional disorder, jealous type - which substantially impaired his control of his actions.

[8] The Crown led evidence from Dr Laura Steven, Consultant Forensic Psychiatrist. The appellant disclosed to her that as a child he was sexually abused by the friend of an older sibling and he was physically abused by his father. Dr Steven gave evidence that at the time of the murder the appellant was under very considerable stress due to worry and preoccupation that he was losing his entire life as he knew it. His long-term partner was throwing him out of the family home. He feared leaving B behind. He was preoccupied that the deceased was having an affair with A, and this was causing him anger, frustration, anxiety and worry. He was suffering from a depressive illness and an adjustment disorder with paranoid ideation, but he was not delusional. He was able to appreciate the nature and wrongfulness of his actions. Dr Steven accepted that there were some indications of there having been a degree of pre-meditation. In the weeks before the murder the appellant told B that he wished the deceased was dead and that if she was not there he and B could continue to live together in the family home. Three days before the murder he stated to B's brother, C, "I'm going to kill your mum".

[9] The jury did not accept Dr Marshall's evidence of diminished responsibility. They convicted the appellant of murder. The verdict was unanimous.

The sentencing judge's appeal report

[10] The sentencing judge considered that the appellant had carried out an extremely violent "planned execution" of a vulnerable domestic partner, in the family home and in the presence of their teenage daughter. He approached sentencing on the basis that the appellant had shown no remorse, and that it was the worst case of domestic violence he had seen. He selected a punishment part of 24 years, which he increased to 25 years because of the partner abuse aggravation. He acknowledged that a punishment part of 25 years might

appear severe, but he judged it appropriate for "a quite horrendous case of premeditated instrumental uxoricide".

Submissions for the appellant

[11] Counsel for the appellant submitted that a punishment part of 25 years for the murder of a single adult victim was excessive. Such a punishment part was appropriate for multiple murders or for the murder of a child. Grading atrocities was difficult and unpleasant, but the appellant's conduct was less heinous than that of the murderers in *Walker* v *HM Advocate* 2003 SLT 130 (27 years for the premeditated murder by machine gun of three serving solders in the course of a robbery), *HM Advocate* v *Alexander* 2005 SCCR 537 (headline sentence of 24 years for the violent and premeditated double murder of an estranged wife and her partner), and *Czapla* v *HM Advocate* [2022] SLT 1299 (23 years for the murder of 2-year-old child by shooting, stabbing and smothering). The circumstances of the appellant were more comparable with those of the first and second respondents in *HM Advocate* v *Boyle & Ors* 2010 JC 66 (punishment parts of 20 and 18 years imposed on the first and second respondents for a sustained assault culminating in setting the victim on fire). The third respondent in that case was given a punishment part of 22 years for the premeditated murder of an elderly woman which was aggravated by attempts to conceal the crime. There had been mitigating factors here. The appellant had accepted responsibility for the killing from the outset - the only issue had been whether there was diminished responsibility. His age was another mitigating factor (*Al Megrahi* v *HM Advocate*, 24 November 2003, unreported, cited in *Boyle* at para [10], page 71); he was 60 at the time of the murder, 63 when sentenced, and he was now 64. He had reached 60 without having previously committed any crime. At the time of the offence he had been under very

considerable stress, and he had been suffering from an adjustment disorder, depressive illness and paranoid ideation.

Decision

[12] The punishment part of a sentence of life imprisonment is the period which must elapse before the prisoner may first apply to the Parole Board for release on parole. Whether a first or any later application for release ought to be granted is for the Board to decide. It will only release a life prisoner on parole if satisfied that they no longer pose a risk to the community.

[13] This court may only interfere with a sentence if it is satisfied that the sentence is a miscarriage of justice (sections 106(1)(b) and 106(3) of the Criminal Procedure (Scotland) Act 1995). A sentence will be a miscarriage of justice where it is "excessive or inappropriate" (*Johnstone* v *HM Advocate* 2013 SCCR 487 at para [54]). The task of the appeal court was defined by LJC Wheatley in *Donaldson* v *HM Advocate* 1983 SCCR 216 at page 218:

> "The function of this court as a court of appeal is not to consider as a court of review whether or not we are of the opinion that some form of sentence other than that passed by the judge in the court below should be imposed. The function of this court is to decide whether in all the circumstances the sentence imposed by the trial judge was or was not excessive. It is only if that question is answered in the affirmative that this court is called upon to determine what the appropriate sentence should be."

[14] As the sentencing judge observed, this was a case where extreme violence involving a knife was used against a partner. The attack was merciless. Other aggravating factors were that the murder took place in the deceased's home; that although 6 years younger than the appellant, the deceased was more vulnerable than him, in particular because of her history of cancer and arthritis; that the attack took place in the presence of B; that there was evidence of a degree of premeditation; and that in the immediate aftermath of

the killing the appellant showed no signs of remorse. The latter two factors require some elaboration. There was evidence that before the murder the appellant had had some thoughts about killing the deceased, but what occurred on the day of the murder appears to have been more an impulsive response to heated argument that day than a killing which was planned in advance. When the police arrived the appellant appeared calm; but when he was interviewed 5 days later by Dr Steven he wept inconsolably, and he expressed deep regret about what he had done.

[15] There are features which are relevant to mitigation. The appellant is now 64. That is not a weighty factor here, but it is one to which some regard should be had (cf *Al Megrahi* v *HM Advocate*, 24 November 2003, unreported, cited in *HM Advocate* v *Boyle* 2010 JC 66 at para [10]). He has no previous convictions. He accepted responsibility for the killing from the outset. He is remorseful. While he was not suffering from a mental disorder which diminished his responsibility for the murder, Dr Steven's evidence was that he was under very considerable stress and was suffering from depression, an adjustment disorder and paranoid ideation. That is a relevant consideration (*Caldwell* v *HM Advocate* 2009 SCCR 606, at paras [22]-[23]; cf *Czapla* v *HM Advocate* 2022 SLT 1299, where the appellant suffered from depression at the time of the murder, but it was self-induced intoxication rather than depression which fuelled his jealousy and spite and caused him to murder his infant son (see para [9])). One of the examples of possible mitigating factors listed in Annex C of *The sentencing process* guideline is mental illness or disability, especially where linked to the commission of the offence. Other examples listed are that the offender is remorseful; and previous otherwise good character, including no previous relevant convictions. On the other hand, where (eg *Czapla*) a murderer is motivated by jealousy and/or is angered by a victim's ending of their relationship, those factors afford no mitigation. The *Principles*

and purposes of sentencing guideline provides that the core principle of sentencing is that sentences in Scotland must be fair and proportionate; and that the principle requires that all relevant factors of a case must be considered, including the circumstances of the offender. The principle also requires that sentences should be no more severe than is necessary to achieve the appropriate purposes of sentencing. It further requires that sentencing decisions should treat similar cases in a similar way, assisting consistency and predictability. Mindful of the last requirement, but keeping in view the core principle and the fact that no two cases are the same, we have compared the circumstances of the present case with several previous cases.

[16] In *HM Advocate* v *Boyle* the first and second respondents' attack on the deceased was a sustained one. Injuries were inflicted using blunt force and weapons, including a knife, and the deceased was burned on a pyre. He died 5 days later. The third respondent strangled and robbed a 64-year-old grandmother in her home. The murder was premeditated. The motive was financial gain. A further aggravation was that the third respondent took steps to try to conceal the crime. On appeal the court considered that the headline punishment parts ought to have been 20 years for the first respondent, 18 years for the second respondent (who had played no part in the initial blunt-instrument attack or in the stabbing), and 22 years for the third respondent. *Rizzo* v *HM Advocate* 2020 SCCR 397 concerned the exceptionally brutal and premeditated murder of a partner. The appellant had a previous conviction for domestic violence. He showed no remorse. The only mitigating factor was his relative youth - he was 23 at the time of the murder. The court held that the punishment part of 22 years was not excessive. *Rauf* v *HM Advocate* 2019 SLT 1406 involved a premeditated attack of a prolonged nature by three appellants using extreme violence. On appeal, the court held that the punishment part of 24 years for the

first appellant was not excessive but that the punishment parts for the second and third appellants should also be 24 years (rather than 25). In *McGowan* v *HM Advocate* 2024 SLT 635 the appellant committed a sustained and savage attack on his partner (see paras [5] and [6] of the court's opinion). The appellant had 57 previous convictions. Some of the offences were for crimes of violence and some involved domestic violence (see paras [8]-[10]). The sentencing judge fixed the punishment part at 23 years, 1 year of which was for a bail aggravation and 1 year of which was for a domestic abuse aggravation. On appeal the court rejected the contention that the punishment part was excessive. In *Czapla* v *HM Advocate* the appellant had been left in charge of his and his former partner's 2-year-old son. He ingested alcohol and drugs to excess, becoming intoxicated. He was angry at his former partner for ending their relationship, and he was jealous that she was seeing someone else. To punish her, he shot the child repeatedly in the head and on his body with ball bearings from a BB gun. The child awoke, partially paralysed and in considerable distress. The appellant then stabbed him in the chest with a skewer and smothered him with a pillow. The court held that the punishment part of 23 years was not excessive.

[17] Having considered the whole circumstances of the appellant's case, weighed the aggravating and mitigating factors, and compared the case with other cases, we are satisfied that the punishment part of 25 is excessive.

[18] The punishment part ought not to have been lengthier than those in *McGowan* or *Czapla*, or as high as the punishment part in *Rauf*. While in some respects *Rizzo* was a worse case, the appellant there was a relatively young adult of 23 at the time of the murder. Here, had there not been the partner abuse aggravation, an appropriate punishment part would have been 21 years, a figure which falls between the punishment parts given to the first

and third respondents in *Boyle*. In light of the partner abuse aggravation the appropriate punishment part is 23 years.

[19] We shall allow the appeal, quash the punishment part of 25 years and substitute a punishment part of 23 years.