



APPEAL COURT, HIGH COURT OF JUSTICIARY

[2025] HCJAC 19
HCA/2025/00007/XC

Lord Justice Clerk
Lord Doherty
Lord Matthews

OPINION OF THE COURT

delivered by LORD BECKETT, the LORD JUSTICE CLERK

in

CROWN APPEAL AGAINST SENTENCE

by

HIS MAJESTY'S ADVOCATE

Appellant

against

JOHN GALLAGHER

Respondent

Appellant: Mohammed KC, AD; the Crown Agent
Respondent: Loosemore, Advocate; Burkinshaw Defence, Peterhead

27 March 2025

Introduction

[1] This is a Crown appeal against an *in cumulo* sentence of imprisonment for 3 years and 4 months for assault and robbery and possession of a knife in a public place, both offences aggravated by bail, on grounds of undue leniency generally, and specifically that the sentencing judge should have imposed an extended sentence.

Procedure

[2] The respondent appeared on petition at Aberdeen Sheriff Court on 2 April 2024 with one charge of housebreaking with intent to steal and one of being found within a building intending to commit theft, both at the same address. He was committed for further examination and released on bail on standard conditions. These charges became charges 1 and 2 on the Indictment.

[3] He appeared there again on 3 July 2024 and was remanded in custody on a second petition containing a charge of assault and robbery and a contravention of section 49 of the Criminal Law (Consolidation) (Scotland) Act 1995, both bearing a bail aggravation. These charges became charges 3 and 4 on the indictment.

[4] On 4 September 2024, the respondent offered a section 76 letter in respect of charge 3 on the indictment. That plea was rejected. On 20 September 2024, he signed two section 76 letters offering to plead guilty to charges 2, 3 and 4. A section 76 indictment called at the High Court of Justiciary on 8 November 2024. His plea of not guilty was accepted on charge 1. The charges to which he pled guilty were:

“(002) on 1 April 2024 you JOHN GALLAGHER were found in a flat at Ground Floor Left, 57 Jute Street, Aberdeen without lawful authority to be there so that, in all the circumstances, it may be reasonably inferred that you intended to commit theft there: CONTRARY to the Civic Government (Scotland) Act 1982 Section 57(1);

(003) on 2 July 2024 at Premier Store, 74 Urquhart Road, Aberdeen you JOHN GALLAGHER did assault Angnes Sivakumar, c/o Police Service of Scotland and you did approach her with your face masked, brandish a knife, make stabbing motions towards her, demand that she give you money, strike a till and counter with said knife, repeatedly utter threats of violence, brandish a pair of scissors, demand that she give you cigarettes, struggle with her, push her on the body and did rob her of a quantity of cigarettes;

you JOHN GALLAGHER did commit this offence while on bail, having been granted bail on 2 April 2024 at Aberdeen Sheriff Court;

(004) on 2 July 2024 at Urquhart Road, Aberdeen, being a public place, you JOHN GALLAGHER did, without reasonable excuse or lawful authority, have with you an article which had a blade or was sharply pointed, namely a knife: CONTRARY to the Criminal Law (Consolidation) (Scotland) Act 1995, Section 49(1) as amended; you JOHN GALLAGHER did commit this offence while on bail, having been granted bail on 2 April 2024 at Aberdeen Sheriff Court.”

[5] The judge imposed a sentence of imprisonment for 2 months on charge 2, backdated to 3 July 2024. A consecutive sentence of 3 years and 4 months imposed, *in cumulo*, on charges 3 and 4, after an adjournment for a Criminal Justice Social Work Report, was reduced for the early plea from 5 years including 1 month for the bail aggravations and backdated to 3 July 2024. The Crown does not challenge the sentence on charge 2.

The circumstances of the offences

[6] At a time when there were no customers in the shop, the respondent entered a Premier convenience store in Aberdeen in possession of a kitchen knife and wearing a balaclava. Ms Sivakumar was behind the till at the time. The respondent brandished the knife and a pair of scissors at her and demanded she open the till. He threatened to stab her if she did not open it, which she pretended she was unable to do. She called the police. The respondent leaned through an opening in the counter and then forced his way through a door separating the counter area from the shop floor to try to open the till. The complainer struggled with him and snatched the balaclava from his head. Despite his continued demands, she refused to open the till. When the respondent's own efforts to open it failed, he grabbed some cigarettes, worth around £350. The complainer struggled with him to prevent him making off with her keys (which he had taken in furtherance of his attempt to get the till open) and struck him with a metal pole; he again threatened to stab her.

Eventually, he left the shop and ran immediately into the arms of two police officers who were on patrol nearby and came upon the crime by chance.

[7] The assault and robbery, captured on CCTV footage we have seen, lasted around 3 minutes. It was an extremely determined assault involving the presentation of a large bladed knife with the appearance of a cleaver. The blade is 18cm long and appears in a photograph provided to be about 4cm wide. Whilst it was not averred in the charge, and did not appear from the footage, that the respondent sought deliberately to strike the complainer with the knife, there was a considerable risk that he might have in the course of a prolonged and violent struggle. Despite her stout resistance, the incident must have been terrifying for the complainer. In her concise victim statement, she explained that she feels unsafe to work in the shop, decided to sell it and cannot work in the evening now.

Respondent's circumstances and CJSWR

[8] The respondent, now 51, grew up in Liverpool. He describes enjoying a positive childhood in a stable family with no traumas or adversities but kept company with older children and got into a lot of trouble as a child. From 17 he moved between living in London and returning to live with his parents in Liverpool but they both died in recent years when he was in prison. He has a son of 24 and another of 15 to two different women with whom he is no longer involved. He has no contact with his younger son. His drug problems destroyed these relationships. He moved to Aberdeen in 2019 as he has a relative nearby.

[9] He left school at 15 without passing formal exams and has worked mainly as a labourer but has not worked for the last 10 years because of his substance misuse. He

reports a history of mental illness over the last 20 years and a diagnosis of bipolar disorder about 10 years ago. He receives appropriate medication.

[10] The respondent began using cannabis and alcohol from 12 and by 18 was drinking heavily and taking cocaine. He has been taking heroin and crack cocaine for 20 years, spending most of his money on it. He has offended when intoxicated by both alcohol and cocaine. He had taken crack cocaine before committing the crime in charge 3. He had little structure in his life prior to his remand. He offends to fund his drug use.

[11] The reporting social worker noted a persistent criminal record beginning when the respondent was 20 in 1993. She considered that his offending demonstrates potential to cause serious harm and proposed that a period of post sentence supervision would be beneficial for public protection purposes.

Previous convictions

[12] The respondent has an extensive record of previous convictions, many of them serious, commencing with three charges of theft from shops in 1993 at Llandudno Magistrates Court. Four other offences were taken into consideration. His record mainly comprises offences of dishonesty but also includes misuse of drugs, driving offences and breaches of court orders. He has offended against bail conditions on 14 occasions, the first being in 1999 when he was imprisoned for failing to surrender to bail.

[13] On 26 July 2012, at Liverpool Crown Court, the court imposed concurrent sentences of 7 years imprisonment for four crimes of robbery committed on bail along with concurrent sentences of 12 months for three crimes of theft by shoplifting, all committed on bail.

[14] Following his move to Scotland:

- on 31 December 2019 the sheriff at Aberdeen imposed imprisonment for 14 months on indictment for possession of an offensive weapon in the form of a knife;
- on 1 March 2022, the High Court of Justiciary imposed imprisonment for 21 months for assault and hamesucken (invasion of a person's house for the purpose of assault);
- On 22 February 2024, the sheriff at Aberdeen imposed a community payback order for 18 months for assault, theft by shoplifting and breach of an undertaking.

Accordingly the respondent was subject to the community payback order for similar, albeit less serious, offending when he committed the crimes on this indictment.

Submissions

Crown

[15] The sentencing judge failed to reflect the gravity of the crimes, particularly charge 3, in light of the respondent's culpability and the harm he caused. He failed to recognise and give sufficient effect to significant aggravating factors. This was a premeditated robbery in commercial premises involving a knife and scissors. The respondent was masked; the knife was thrust towards the shopkeeper and he made repeated threats; there was a struggle in a confined space behind the counter during a sustained incident lasting about 3 minutes. The impact on the victim, who no longer felt safe working in the evening and decided to sell her shop, was considerable despite the absence of physical injury. The respondent's serious criminal record, notably the convictions in Liverpool Crown Court and the High Court at Glasgow, was another materially aggravating feature. His admission to the reporting social

worker that he was intoxicated, having taken crack cocaine, was a further aggravating feature. The respondent presents a material risk to the public such that the judge should have imposed an extended sentence.

[16] Whilst the sentencing judge had reported consideration of a number of cases, none was materially relevant as none appeared to relate to robbery in a commercial premises. The only mitigating feature was the early plea for which full allowance was made from a headline that was unduly lenient, resulting in an unduly lenient sentence.

Respondent

[17] The court was bound to apply the law as explained by the Lord Justice General (Hope) in *HM Advocate v Bell* 1995 SCCR 244. Accordingly, it would not be sufficient if we might have considered a more severe punishment appropriate. Since the sentencing judge set out all of the aggravating factors, there was no basis to conclude that he had failed to apply his mind to them. It could not be said that the sentence fell below the range reasonably open in the circumstances. The Crown had failed to identify any reported case demonstrating that this was an unduly lenient sentence. The court should not increase the prison term merely to permit the imposition of an extended sentence. Whilst the level of sentence imposed permitted the imposition of a supervised release order under section 209 of the Criminal Procedure (Scotland) Act 1995, the criteria were not met. The appeal should be refused.

Decision

[18] Section 210A of the 1995 Act provides that where a person is convicted on indictment of a violent offence, the court may, if it considers that the period (if any) for which he would

be subject to a licence would not be adequate for the purpose of protecting the public from serious harm from him, pass an extended sentence.

[19] The Lord Justice General set out a test in *Bell* that this court continues to apply in considering Crown appeals against sentence on the ground of undue leniency. He explained, at page 250D:

“It is clear that a person is not to be subjected to the risk of an increase in sentence just because the appeal court considers that it would have passed a more severe sentence than that which was passed at first instance. The sentence must be seen to be unduly lenient. This means that it must fall outside the range of sentences which the judge at first instance, applying his mind to all the relevant factors, could reasonably have considered appropriate. Weight must always be given to the views of the trial judge, especially in a case which has gone to trial and the trial judge has had the advantage of seeing and hearing all the evidence. There may also be cases where, in the particular circumstances, a lenient sentence is entirely appropriate. It is only if it can properly be said to be unduly lenient that the appeal court is entitled to interfere with it at the request of the Lord Advocate.”

[20] There was no trial giving the sentencing judge any particular advantage. There was an agreed narrative of the circumstances and we have viewed the same CCTV footage that he saw. Beyond the tendering of early pleas of guilty, for which the judge made full allowance, no compelling reasons for leniency are apparent. It does not appear that the respondent's depression played any part in his committing these crimes.

[21] The sentencing judge concluded that the respondent did not intend to strike the shopkeeper with the knife, his intention being to scare her. He was entitled to reach that conclusion, but its potential to mitigate is very limited in this case. He noted the absence of injury, presumably a reference to physical injury. He reports that the complainer gave up the shop. Whether he had in mind previous convictions in Scotland or all of them, he was conspicuously generous in reporting that the respondent's convictions are mostly minor. Whilst the Crown did not refer us to authorities to vouch a pattern of sentencing for robberies of shops and other commercial premises if, as para [5] of his report suggests, the

judge assessed the gravity of this indictment by reference to reports of assaults, as opposed to assault and robberies, he was in error. That the respondent appeared to the judge to be genuinely remorseful carried limited mitigating weight in light of his criminal record and the whole circumstances of this pre-meditated crime. It is difficult to find mitigating weight, as the judge did, in the respondent's lack of success. It was not the result of any restraint on his part but of the shopkeeper's resolute resistance.

[22] The judge reports that had he imposed a sentence of 4 years, he might well have imposed an extended sentence; but that he refrained from doing so because the sentence he intended to impose was less than 4 years (section 210A(1)(a)(ii)). It is puzzling that he did not instead make a supervised release order under section 209 in a case where the protection of the public from serious harm was such an obviously important consideration.

[23] Whilst most of the cases date from the 1990s, early 2000s and the most recent is 2010, there are examples of sentencing for robberies in Morrison, Sentencing Practice at F12.0003-78. Although these cases may no longer represent contemporary sentencing practice, they give some indication of patterns of sentencing. We note *Docherty v HM Advocate* 16 May 2002, at F12.000 6.3 where for the first appellant the court sustained a sentence of imprisonment for 8 years for the targeted street robbery of a bookmaker's female assistant carrying takings to a post office. There was no weapon and the violence was modest but in light of the first appellant's bad record and the vulnerability of the complainer, 8 years did not exceed the range of sentence reasonably available to the trial judge. We also draw on our own experience of sentencing at first instance and in considering appeals against sentence in cases of assault and robbery. The imposition in recent years of the imposition of orders for lifelong restriction for assault and robbery in appropriate circumstances is within that experience.

[24] In the Scottish Sentencing Council's "Sentencing Process" Guideline, Annex B lists examples of possible aggravating factors. They may be integral features of an offence in which event they should feature only in the assessment of seriousness of the offence and not treated as a separate aggravating feature. Amongst the examples listed for consideration is:

- The offence was committed whilst under the influence of alcohol or drugs which were consumed voluntarily.

Other examples chime in this case:

- The offence was committed whilst the offender was on licence or subject to another order of the court.
- Any relevant previous conviction(s) which the offender has, particularly where they disclose a pattern of repeat and/or similar offending.
- The deliberate targeting of a victim who is vulnerable or perceived to be vulnerable.

[25] The respondent robbed a shop in which a woman worked alone, providing a valuable public amenity. Such a person can be vulnerable to the kind of attack featuring in this case. The respondent chose a time when there was no customer in the shop in order to exploit her vulnerability. The courts must do what they can to deter such offending. Shop staff and other workers who provide services or amenities to the public must be protected from someone such as the respondent who decided to rob a shop, armed himself, donned a mask and sought to terrorise a shop-worker with a large and dangerous knife and, in this case, also a pair of scissors.

[26] The Advocate Depute set out a number of significantly aggravating circumstances. That there is CCTV footage of the commission of this crime is not of itself aggravating, but it vividly illustrates aggravating features. The respondent showed considerable persistence

over more than 2 minutes in response to the shopkeeper's extraordinary courage, resistance and her determination not to succumb to robbery. Events took place in a confined space increasing the risk of the knife causing injury, even if the respondent did not intend to cause it. His admitted intoxication is a material consideration in the gravity of this crime as it increased the risk that his compromised ability to control his actions may lead to accidental injury from the knife he was aggressively presenting at the shopkeeper in very close proximity to her in the course of a sustained struggle. His repeated threats to stab the shopkeeper are another serious feature.

[27] The respondent has an extensive criminal record including comparable offending. He was subject to a community payback order when he committed this crime, breaking bail conditions as he has previously done on numerous occasions. The reporting social worker highlighted the need for post-release supervision in order to protect the public from harm.

[28] When regard is had to all relevant circumstances, we consider that the sentencing judge erred in his assessment of the gravity of charges 3 and 4. He selected a sentencing range on the basis of different crimes. He also failed to recognise, or give adequate consideration to, the following circumstances:

- that the respondent's lack of success was not a materially mitigating factor when it is accounted for by resistance by the shopkeeper as opposed to any restraint on the respondent's part;
- the significance of the respondent's intoxication in the particular circumstances of this case;
- the necessity of protecting the public from serious harm by the imposition of post-custody supervision.

[29] For these reasons, we find that the sentence imposed on charges 3 and 4 was unduly lenient and that we must pass sentence of new. Given the respondent's serious and relevant previous convictions and the significantly aggravating features of charge 3, committed in the face of a bail aggravation, we consider the appropriate custodial term on charges 3 and 4, *in cumulo*, would be 7 years and 6 months, of which 6 months is attributed to the bail aggravation. In order to protect the public from serious harm, but for the plea of guilty, we would have imposed an extended sentence of 10 years and 6 months with a 3 year extension period. As it is, allowing for the respondent's guilty pleas, we shall impose an extended sentence of 8 years with a custodial term of 5 years and an extension period of 3 years during which the respondent will be subject to licence conditions fixed by the Scottish Ministers. As before, this sentence will be served consecutively to the sentence of imprisonment of 2 months imposed on charge 2. The sentence on charge 2 was backdated to 3 July 2024.