



APPEAL COURT, HIGH COURT OF JUSTICIARY

[2026] HCJAC 22
HCA/2026/000028/XC

Lord Justice Clerk
Lord Matthews
Lady Carmichael

OPINION OF THE COURT

delivered by LORD MATTHEWS

in

CROWN APPEAL AGAINST SENTENCE

by

HIS MAJESTY'S ADVOCATE

Appellant

against

KEVIN SMITH

Respondent

Appellant: Keenan KC (Sol Adv) AD; the Crown Agent
Respondent: Nelson KC, McMillan; John Pryde & Co

12 June 2026

Introduction

[1] On 18 December 2025, following his plea of guilty to a charge of assault to severe injury, permanent disfigurement and danger of life, the respondent was sentenced to imprisonment for 28 months and a Supervised Release Order for a period of 12 months was imposed. The appeal is on the basis that the sentence is unduly lenient and that the

sentencing judge erred in law by reducing the sentence under reference to section 91 of the Police, Public Order and Criminal Justice (Scotland) Act 2006.

[2] The argument as to undue leniency incorporates a challenge to the amount by which the sentence was reduced to reflect the respondent's plea of guilty (the discount). That does not fit easily under the banner of undue leniency but in the result that consideration is of little consequence.

The history of the case

[3] The respondent appeared on petition on 21 November 2022 and was committed for further examination in custody. On 29 November he was liberated, there being insufficient evidence for full committal.

[4] In due course, however, he was indicted along with two co-accused, Emma Hyslop and Steven Mitchell. A preliminary hearing was scheduled for 23 February 2024 but was discharged administratively. On 18 April 2024 a trial diet was appointed to float from 17 February 2025. On 18 February, when the case called, the respondent was the only accused person present. Warrants were granted for the other two and a direction was made that the indictment should not fall in respect of them. The dedicated floating diet was discharged, and 20 February was assigned as a fixed diet of trial. On that date the warrants remained unexecuted, and the trial diet was discharged until 17 November 2025. Both Ms Hyslop and the respondent were present then and the case was continued overnight to allow the police to follow up information as to Mr Mitchell's whereabouts. On the following day Mr Mitchell had still not been apprehended and the case against him was deserted *pro loco et tempore*. The jury had been balloted the previous day and the trial duly commenced. Certain evidence was led, as it was on 19 November. The complainer's evidence

commenced after lunch and continued into the following day. Two further witnesses were lead before the trial was adjourned until 21 November.

[5] On that date, following certain discussions, both Ms Hyslop and the respondent tendered acceptable pleas of guilty.

[6] We need not discuss the situation with Ms Hyslop.

[7] As far as the respondent is concerned, his plea of guilty, which was to charge 3 of the indictment, was in the following terms:

“(003) on 19 October 2022 at (an address in Glasgow) you KEVIN SMITH whilst acting along with STEVEN MITCHELL whose whereabouts are meantime to the Prosecutor unknown, and did assault JJO... lock him within said property and detain him there against his will, repeatedly strike him on the neck and body with knives or similar implements, repeatedly strike him on the head and body with a glass bottle and a TV stand, all to his severe injury, permanent disfigurement and to the danger of his life.”

The charge was aggravated by reason of having been committed while on bail.

[8] It should be noted that the plea was under deletion of references to abducting the complainer, striking him on the body with a metal pole or similar implement and attempting to murder him.

[9] The trial judge in his report sets out certain of the evidence which was led but the relevant circumstances were agreed in the narrative which was presented to him.

Ms Hyslop had been in a relationship with the complainer for about 3 months. Around 15 October 2022 she moved into his flat. The respondent knew both Ms Hyslop and Mr Mitchell, but the complainer did not know either man. On the evening of 19 October, after some activities which we need not narrate, all four entered the complainer’s flat. The three accused consumed cocaine in the kitchen while the complainer sat in his living room drinking lager. He became increasingly concerned by the behaviour of the three people in the kitchen. He thought that Ms Hyslop was stirring things and was apprehensive that he

was about to be attacked by the two men. His fears were realised. Shortly after 2300 hours all three accused emerged at speed from the kitchen and the offence was committed. The complainer was slashed on both sides of his neck by Mr Mitchell as the respondent simultaneously inflicted at least 16 penetrating wounds to his back with a sharp implement. The respondent told the author of the Justice Social Work report that it was a small meat skewer with two prongs. The weapon used by Mr Mitchell was a Stanley knife. During the attack the complainer fell to the floor and was struck multiple times to the back of his head with a Budweiser bottle and a metal pole from his TV stand.

[10] The three accused fled after the assault.

[11] The assailants had taken the complainer's mobile phone and keys and locked him in his flat. He had to shout from his window and throw items onto the street to attract attention. Eventually this was noticed and the police and ambulance services attended. He was bleeding heavily.

[12] The paramedics noted that his blood pressure was very low and he was taken to hospital. He had 3x 1cm wounds to the left neck area, 2x 1cm neck wounds to the right side of his neck, 16 small wounds less than 0.5cm across his back, a cut to the back of his head and superficial cuts across his cheek and forehead. He had suffered considerable blood loss from the neck injuries but there were no internal injuries and his wounds, of which the majority were superficial, were cleaned, with 20 stitches being inserted. He now has scarring to both sides of his neck. He was discharged early the following morning with no follow up required. The injuries, particularly those to his neck, were potentially life-threatening.

[13] The respondent is now 40 years of age. He is unemployed and in receipt of benefits. He has 14 previous convictions. His first offence resulted in a conviction on 25 June 2003 for

culpable homicide and it resulted in detention for 7 years. He was 16 years of age at the date of the sentence. Since then, he has had several assault convictions and periods of imprisonment. In 2016 he was sentenced to imprisonment for 18 months for being concerned in the supplying of controlled drugs. In 2019 he was sentenced to 16 months' imprisonment for a contravention of section 49(1) of the Criminal Law (Consolidation) (Scotland) Act 1995 (having with him a bladed or sharply pointed object).

[14] The trial judge tells us that the injuries inflicted by the respondent were "small wounds" and "superficial" in nature. That would appear to be correct so far as his personal involvement is concerned. The judge's clear impression was that Mr Mitchell was the individual responsible for the significant violence and that he did so in response to being incited to do so by Ms Hyslop. He did so by using a knife with no prior notice that he was going to do so. The sentence was selected primarily on the basis of the fact that the co-accused inflicted the significant element of violence. That was in circumstances which were unanticipated at the time.

[15] The respondent had been attending Cocaine Anonymous, to which he had contributed as a leader at groups. He had completed a 12-step programme towards abstinence, and his father reported a complete change in him over the past 2 years. He and his partner were due to have a baby in June 2026.

[16] The judge tells us that he was aware that there had been formal correspondence from those acting on behalf of the respondent to the Crown, offering assistance with the prosecution of Mr Mitchell. At the adjourned diet the Advocate Depute expressly addressed the court on the question and stated that the Crown intended to proceed with the case against Mr Mitchell and would seek to take a statement from the respondent as part of that process. The judge interpreted that as the Crown acknowledging and indicating they would

accept the respondent's offer to cooperate and did so knowing that that would be reflected in any sentence.

[17] The judge accepts that he sought to rely on section 91 of the Police, Public Order and Criminal Justice (Scotland) Act 2006 on the basis that an offer to assist the prosecution would be sufficient to invoke the provision. He would have approached the matter in the same way at common law.

[18] As to the reduction in respect of the plea, the judge reports that much of the delay in the trial and the leading of the evidence which appeared to have led to the deletion of the averment of attempted murder was outwith the control of the respondent. The judge applied a broad brush, reducing the headline sentence by 10% for the offer and apparent acceptance of assistance and 10% for the plea of guilty.

[19] We note also that the trial judge considered the overall seriousness of the case, in relation to the respondent, to be moderate. This was based on his assessment of the respondent's own culpability and the harm caused by his own actions.

Submissions for the Crown

[20] Section 91 of the 2006 Act was not in play. It only applied where there was a written agreement to assist or offer to assist the prosecutor (section 91(1)(b)). The role of the respondent could not be described as subsidiary, radically different or significantly less than that of Mr Mitchell. He pleaded guilty on the basis of art and part responsibility. During the sustained attack, while the co-accused used a Stanley knife to strike the complainer in the neck, the respondent "simultaneously" used his weapon to inflict at least 16 penetrating wounds to his back. The physical harm was as described above and the complainer suffered

psychological harm. He had become “a bit paranoid” and did not like to go out to the pub anymore. He had had to be rehoused.

[21] The offence was aggravated. It was committed by the respondent whilst under the influence of alcohol and other substances. The complainer was attacked in his own home and had been locked in the property, preventing him from obtaining assistance. The respondent had a significant record. He was assessed by the author of the Justice Social Work report as posing a maximum risk of reoffending and “a significant risk of harm to the public.” The headline sentence did not properly reflect the seriousness of the offence and the aggravating factors. No part of it was attributed to the bail aggravation.

[22] In the circumstances the level of discount was excessive. While it was a matter of discretion, it was not wholly unfettered (*Gemmell v HM Advocate* [2011] HCJAC 129, 2012 JC 223 [32]). In the 3-year period between first committal and the trial the respondent had never approached the Crown to offer to plead guilty, even in reduced terms. After the tendering of the plea and the narrative, the issue of some form of agreement had been raised by the trial judge. The Crown thought it was not appropriate for that to be considered. The court was told of this in writing. It was indicated that if the process were carried on against Mr Mitchell the Crown would seek to take a statement and might call the respondent as a witness. The solicitor advocate for the respondent indicated he was willing to cooperate. However, that never came to pass. The co-accused was apprehended and he pleaded guilty.

Submissions for the respondent

[23] In relying on section 91 of the 2006 Act, where there was no written agreement, the judge had erred. Absent the provisions of section 91, the question of assistance could be considered as part of a judge’s overall assessment of circumstances. That was not how the

judge approached the matter, however. As to undue leniency, the deletion of attempted murder was important. The conviction for culpable homicide was when the respondent was only 16. A custodial sentence was inevitable, but the harm could have been much greater than it was, albeit that might be a matter of luck. The trial judge thought that the harm caused by the respondent was moderate. He excluded Mr Mitchell's actions from that assessment but there could be no differentiation in the harm caused. It was exactly the same. Nonetheless the trial judge was entitled to differentiate as to responsibility. He had heard the evidence in the case. It was submitted that in all the circumstances the disposal was not unduly lenient.

[24] It was accepted that, while the decisions as to discount were discretionary, that discretion was not unfettered. The plea was not an early one but there had been no speeches and verdict involved. Only 4 months was allowed.

[25] In short, there had been an error in law as to section 91 but the headline sentence and the reduction for the plea were both within a reasonable exercise of the trial judge's discretion.

Analysis

[26] It is not necessary to quote the terms of section 91 of the 2006 Act. It is quite clear that it only applies where there has been a written agreement made with the prosecutor. Where that has happened, the court must take into account the extent and nature of the assistance given or offered. If sentence is passed which is less than that which would have been passed but for the assistance, the court has to say in open court that it has, for that reason, passed the lesser sentence and what the greater sentence would have been. The court need not, however, do so if it considers that it is not in the public interest.

[27] In circumstances where the Act does not apply but there is nonetheless an offer of assistance it would be open to the court to attach such weight to that as it thought appropriate, but no specific discount would be expressed. It would simply be one of the circumstances to be taken into account in assessing the headline sentence. See for example *Cormack v HM Advocate* [1996] SCCR 53 and *O'Neill v HM Advocate* [1999] JC 1. Reduction for a guilty plea is different as a result of statutory provision: Criminal Procedure (Scotland) Act 1995, section 196(1A).

[28] In the instant case, even if there was an offer to provide a statement and give evidence in due course against Mr Mitchell, that was untested, given Mr Mitchell's plea after he was apprehended. In any event, the respondent would doubtless have been cited to give evidence and would have had no choice in the matter. If he appeared as a witness, he would have been under a legal duty to tell the truth. There was, in short, no basis upon which the trial judge could properly afford him any reduction in his sentence as a result of his expressed willingness to cooperate.

[29] As for the test in undue leniency appeals, it is set out in the well-known dicta of Lord Justice General Hope in *HM Advocate v Bell* [1995] SCCR 244. At pages 250D-251A he said the following:

"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 of 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....the Appeal Court has a discretion as to whether or not to pass a different sentence if it is satisfied that the original sentence was unduly lenient. But it is not obliged to impose a more severe

sentence if, in all the circumstances, it does not consider this appropriate. It should and will do so if a more severe sentence is necessary for the protection of the public, or because the offence is a very serious one and a more severe sentence is required in order to provide guidance to sentencers generally.”

It is open to the sentencer to have regard to the different roles which participants in a common purpose played. Generally speaking, the principal of comparative justice is that those who have been convicted of the same offence should normally receive the same sentence: *Armstrong v HM Advocate* [2021] HCJAC 34, 2021 JC 227; *Gardiner and Anderson v HM Advocate* [2024] HCJAC 44, [2025 JC 114, [43]. As was said in *Gardiner and Anderson*, there can be differences as a result of personal circumstances, previous convictions and the roles played by each accused in the attack.

[30] In this case, while the co-accused inflicted the more serious injuries with a knife, the respondent joined in more or less simultaneously, attacking the complainer with a weapon and inflicting a considerable number of injuries on him. This would have increased his terror and decreased his ability to defend himself. The co-accused was personally responsible for the infliction of the more serious injuries but there is little to choose between the two. The trial judge lays emphasis on the use of the knife being unanticipated, but the respondent pleaded guilty to concerted involvement in its use, as well as the attack with the bottle and the TV stand. The consequences for the complainer could have been fatal. As it is, the assault, aggravated in the manner described by the Advocate Depute, was a very serious one meriting a sentence far in excess of that which the trial judge thought appropriate to mark the serious nature of the offence and to reflect the respondent’s record.

[31] As to the reduction in the sentence on account of the plea, given that we are interfering with the sentence it is open to us of new to consider that matter. We would not

have expected the Crown to appeal on the question of discount alone, especially given the small periods involved, but the whole matter is at large for us.

[32] The trial judge's approach is misconceived. Whatever the Crown did or did not do and whatever the order in which they chose to lead evidence, it was always open to the respondent to offer a plea, even if that was rejected. Tendering a plea after several days of evidence, including that of the complainer might well result in no reduction at all. An appeal in such a decision would be almost bound to fail.

[33] However, in all the circumstances we recognise that there was some, albeit very limited, utilitarian value in the plea. It can attract only a token discount.

[34] In the result, we quash the sentence imposed at first instance. We note that the trial judge considered it necessary to make a Supervised Release Order on the basis that ordinary licence arrangements would be insufficient to protect the public from serious harm from the respondent. We agree with him in that respect, given the gravity of this crime alongside the respondent's persistent record for crimes of assault, carrying bladed articles, breaching bail conditions and his conviction for culpable homicide. In its place we substitute an extended sentence of for 8 years and 2 months with a custodial term of 5 years and 2 months and an extension period of 3 years. The custodial term is reduced from a headline sentence of 5 years and 4 months, the 4 months being attributable to the bail aggravation, which the trial judge seems to have overlooked.

[35] The Crown's appeal is allowed to that extent.