



APPEAL COURT, HIGH COURT OF JUSTICIARY

[2019] HCJAC 42
HCA/2018/000497/XC

Lord Drummond Young
Lord Turnbull

OPINION OF THE COURT

delivered by LORD DRUMMOND YOUNG

in

APPEAL AGAINST SENTENCE

by

JOHN FALCONER

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: G Gebbie; Walker & Sharpe
Respondent: D Small, AD; Crown Agent

2 April 2019

[1] The appellant was convicted after trial of three principal charges. The first was that on various occasions in November and December 2015, he assaulted a named woman, his then partner and raped her both vaginally and anally, contrary to section 1 of the Sexual Offences (Scotland) Act 2009.

[2] The second charge was that, on an occasion in July 2017, with a different partner, the appellant assaulted her and raped her vaginally and anally, contrary to section 1 of the Sexual Offences (Scotland) Act. The third charge was that on a different occasion the same second partner was raped again, contrary to section 1 of the 2009 Act.

[3] After trial the judge obtained a criminal justice social work report containing a risk assessment for an extended sentence. A psychiatric report was also available to the judge.

[4] The judge imposed an extended sentence of 11 years in total with a custodial portion of 8 years and an extended portion of 3 years. This was backdated to the date of conviction. The judge narrates, however, that she took account of a period spend in custody before sentence.

[5] The facts are essentially as narrated in the charges. The appellant was in a relationship with each of the complainers and the incidents of rape took place then. The relationship with the second complainer, that in the second and third of the charges, was described as tempestuous. They had many arguments during the period when they lived together.

[6] The judge in sentencing noted that the appellant had a number of previous convictions of a domestic nature but that these had resulted in community disposals or short periods of imprisonment. The criminal justice social work report and a defence report on mental health were available and were taken into account by the judge. She records that the social work report narrated that the appellant was a service veteran with a diagnosis of PTSD. He had difficulty in interacting with others, in understanding himself and in understanding his emotions and his psychological experiences. He found it difficult to conform in a normal manner to the demands of civilian adulthood. It had been suggested

that sexual activity was used as an alternative to responsible coping strategies; that is of course an opinion from a social worker and not a psychiatrist.

[7] At the time when the appellant was initially in the community after leaving the Army, his PTSD was not properly treated. That does not appear to be in doubt. The criminal justice social work report concluded that there was a high risk of further sexual re-offending and a medium risk of violent recidivism.

[8] Evidence was also available from a psychiatrist, Dr Ahmed, instructed by the defence. Dr Ahmed referred to an extremely traumatic event that had occurred in Afghanistan in 2010 when the appellant was on active service there. In trying to rescue the appellant, who had been trapped in a door, one of his colleagues accidentally activated an improvised explosive device which exploded and led to that colleague losing his life, suffering very severe damage in the process. The commander of the appellant's section also died as a result of this incident despite the appellant's efforts to keep him alive. The immediate cause of death appeared to be a break in the line that was providing fluid to the section commander following serious injury when that line was under the charge of the appellant. It is understandable that these were extremely traumatic events and the court is in no way surprised by the diagnosis of Post Traumatic Stress Disorder.

[9] The judge concluded that the appellant was a risk to the general public, and in particular to any women with whom he might become involved. She stated that she gave some weight to the diagnosis of PTSD but she considered that the appellant was likely to continue to represent a risk to the public on release from prison. As a result she decided to impose an extended sentence. She considered that a lengthy custodial part was necessary to punish the appellant to mark society's disapproval and to protect the public and act as a deterrent. She commented on a suggestion in the grounds of appeal that insufficient weight

had been given to the diagnosis of Post Traumatic Stress Disorder and the lack of proper treatment thereafter. The appellant by the time of sentence was getting proper treatment which would reduce the risk.

[10] The judge accepted that there was continuing Post Traumatic Stress Disorder. She took the difficulties caused by the appellant's military experience into account but she still thought that he was likely to present a danger to women, and she referred to the fact that he had told the social worker of a fear that he might act violently when released.

[11] The important point here, it seems to us, is that there was a tension between the diagnosis of Post Traumatic Stress Disorder as an explanation for the appellant's mental state and the fact that he still appeared to present a risk to women with whom he might come into contact and form a relationship. The protection of those women was clearly an important matter that the judge had to take into account.

[12] On appeal, a number of further points were referred to, and we can deal with them shortly. It was submitted that approximately 1 year was spent on remand. The trial judge, however, says that she took that into account in the custodial part of the sentence that she imposed. It was clear from the appellant's record that he was subject to a number of short sentences immediately before the sentence that is now the subject of the appeal. We therefore accept what the trial judge says on that matter.

[13] The more important ground of appeal was that insufficient account had been taken of the very traumatic experiences that the appellant had suffered in Afghanistan. As a consequence it was said he turned to illicit drugs as a coping mechanism. As a result of that, he was discharged from the Army in 2011. Before that, there had been no offending. We accept that.

[14] The Post Traumatic Stress Disorder was diagnosed in 2014. A drug was prescribed and counselling was recommended at that stage but there was difficulty in implementing these recommendations. Offending had developed but at that time proper medication and treatment was not being received for PTSD. Those were now being received. Thus, it was submitted, an improvement in reduction of risk factors is to be expected. Stress was also placed on the fact that, while there were repeated domestic disturbances, there had been an escalation in offending which occurred during the period when there was no medication or treatment being taken for PTSD. Some reference was also made to the volatile and disputatious relationship with the complainer in the second and third of the charges of which the appellant was convicted. It was submitted that there were emotional difficulties on both sides. Because proper treatment was now being received it was submitted that the risk of recidivism was not as stated in the criminal justice social work report and should be regarded as significantly reduced. For that reason, it was submitted that the sentence imposed was excessive.

[15] We would regard a sentence of 8 years imprisonment with an extension period of 3 years in addition as a standard sentence for the sort of sexual offending that is in issue here. Apart from the fact of PTSD, we cannot fault that sentence. The main argument is that the PTSD is now being treated and that that should reduce the risk of further offending. In that connection we were referred to passages in the criminal justice social work report and also to the psychiatric report obtained from Dr Ahmed immediately before the imposition of sentence. But the problem that we have in this is essentially twofold. First of all the trial judge did take account of the diagnosis of PTSD. This is clear from paragraphs 37 and 38 of her report. Notwithstanding that she considered that the appellant posed a risk to the general public and in particular to women with whom he might be involved. That is

repeated at paragraph 40 where she states that the appellant was likely to present a danger to women. To some extent the judge took account of what had been said in the social work report, but it is clear that that was merely one factor in the assessment. The judge was also entitled to take account of the repeated incidents of rape disclosed by the charges. These by themselves seem to us to suggest a clear risk of danger to any future partners that the appellant might encounter.

[16] As far as the PTSD is concerned there is it seems to us one important factor. There is nothing in the psychiatric report from Dr Ahmed to address the causal link between PTSD and the repeated rapes of the two complainers disclosed by the three material charges. This is not a case such as, for example, becoming involved in a street fight where, as a matter of common sense, one might expect PTSD to be a possible causative factor explaining involvement. Rape is quite different from that, and we cannot discover anything in the papers before us, in particular Dr Ahmed's report, to suggest that there is any causal link between the PTSD and these particular, extremely unpleasant, incidents of rape.

[17] The treatment that the appellant is now receiving in the form of medication and further forms of treatment for his PTSD may have an effect in that if they are successful he might be released at the earliest possible opportunity, that is 4 years into the custodial part of his sentence. That does not, however, alter the fact that from the very fact of these repeated rapes there is an obvious risk to future partners. We must take into account the risk to the public presented by the appellant. As we have noted, Post Traumatic Stress Disorder, although clearly a factor that produces sympathy, does not reduce the risk to the public. For that reason, we do not think that ultimately there is merit in this ground of appeal.

[18] For that reason, we will refuse the appeal and affirm the trial judge's sentence.

