APPEAL COURT, HIGH COURT OF JUSTICIARY

[2025] HCJAC 4
HCA/2024/000623/XC

Lord Matthews
Lord Beckett

OPINION OF THE COURT

delivered by LORD MATTHEWS

in

Appeal against Sentence

by

NRL

Appellant

against

HIS MAJESTY'S ADVOCATE

Respondent

Appellant: McCall KC; Faculty Appeals Unit for James McKay Solicitors, Elgin
Respondent: Keenan KC AD; Crown agent

21 January 2025

[1] The appellant pleaded guilty by section 76 procedure to a charge of culpable homicide. It was to the effect that on 2 February 2024, at a bus station in Elgin, he assaulted Keith Rollinson, then aged 58, by head-butting him and repeatedly punching him on the body, in consequence of which Mr Rollinson collapsed and died.

[2] On 18 November 2024, having considered reports, the sentencing judge ordered the appellant to be detained for 4 years and 4 months, reduced from 6 years and 6 months to reflect the timing of the plea.

[3] Leave to appeal was granted but only in respect of the length of the sentence.

[4] It is as well to rehearse the relevant circumstances as set out in the judge's report.

[5] On 2 February 2024, Mr Rollinson was working in the course of his employment as a bus driver. During that evening the appellant and several other youths had congregated in Elgin town centre and consumed alcohol. The appellant was noticeably intoxicated. At around 10.00pm he and another youth walked to the bus station to travel home. About 10.30pm he tried to board a bus which was to be driven by Mr Rollinson. He was refused travel due to his state of intoxication. He became agitated and upset, arguing with Mr Rollinson, and claiming that it was illegal for a person under 16 to be refused travel. He said he had no other way to get home. Mr Rollinson would not move the bus until the appellant disembarked and he (Mr Rollinson) then made his way on to the concourse. The appellant continued to protest and called the police on his mobile phone to complain about Mr Rollinson. The latter sought assistance from a colleague before returning to the concourse where the appellant continued to remonstrate with him. He pointed his mobile telephone in Mr Rollinson's face, apparently filming him. At this point Mr Rollinson grabbed the phone and this led to a physical struggle during which the appellant head-butted him. The struggle continued and Mr Rollinson threw the phone to the ground before stamping on it several times. At this the appellant completely lost control and rained punches on Mr Rollinson's head and body. Mr Rollinson did not retaliate but tried to get away from the appellant. It would later be discovered that the appellant had fractured a bone in his hand. He was eventually pulled away by another youth. Within a short space of

time Mr Rollinson collapsed unconscious. He was immediately assisted by a colleague and later by police and paramedics but he never regained consciousness and his life was pronounced extinct at 00.45 hours the following day.

[6] Before Mr Rollinson collapsed the appellant left the bus station by taxi and returned home. He discussed the assault several times during the journey. He later called a friend on the telephone admitting having hit Mr Rollinson and saying that he was not waking up. He was upset and crying. He was quickly traced to his home. The arresting police officers said that at times he was upset but at other times displayed an air of arrogance and did not appear to appreciate the severity of the situation. He said that he had acted in self-defence and had prayed to God that the deceased would be alright.

[7] A post-mortem examination showed several areas of swelling and bruising to Mr Rollinson's face and head, including his forehead, right eye, right eyebrow and right cheek, as well as areas of haemorrhage. These were all minor blunt force injuries which did not *per se* contribute to his death. There was no bony injury and no underlying brain injury but he was found to have significant narrowing of the coronary arteries with areas of apparent scarring present. He would have been at risk of a sudden fatal cardiac event at any time. It was most likely that the physical altercation as a whole had led to increased blood pressure and cardiac arrhythmia, followed by cardiac arrest. He also had diabetes, which would have predisposed him to heart disease and may have played a role in his death. It is said that but for the assault he may not have died when he did. While some reliance was placed on this by senior counsel, it was accepted that an assailant must take his victim as he finds him and the plea of guilty meant that the appellant accepted responsibility for causing Mr Rollinson's death.

The deceased and his family

[8] Mr Rollinson had been employed by the RAF at Lossiemouth but for over a year had been working as a bus driver. He was 58 and married with two adult daughters. His wife and daughters produced victim impact statements. The contents are heart-rending and eloquent of their tremendous loss. The police had advised them that they could not touch Mr Rollinson in hospital because of the ongoing criminal investigation, which added to their distress. Their lives are utterly transformed by what happened and their grievous loss.

The appellant

[9] The appellant is 16 years of age and was 15 at the time of the offence. He had been involved with police on several occasions and referred to the Children's Hearing a number of times. Most notably he committed a previous assault on a bus driver, leading to the imposition of a Compulsory Supervision Order.

[10] He explained to the author of the CJSWR that he had been "a bit steaming" and began "bickering" with Mr Rollinson when refused travel. He was going to record the deceased on his phone and, while others had tried to hold him back, he had broken free and assaulted Mr Rollinson. The author of the report believed that the appellant had repressed a lot as a coping mechanism and given his young age and stage of development he would find it difficult to process what had happened and its impact on him. The charge had originally been one of murder. The offence would stay with him forever and he would not lift his hands again.

[11] His parents had separated when he was perhaps around 3. He had apparently witnessed domestic abuse when younger. In 2022 he had been assessed as being outwith parental care (presumably meaning control). Police involvement started at about 13, being

the age at which he had started drinking. When he was 14 he was socialising with a group of older persons. His position now was that he had made bad decisions when under the influence of alcohol. He had truanted from secondary school, his engagement having been sporadic. He reengaged in November 2023 and began attending 2 hours each week. He had done well in school and was an intelligent young man. Because of his progress the Compulsory Supervision Order had been revoked on 16 January 2024, a few weeks before the offence.

[12] During his period of remand in Kibble he had been taught on a 1 to 3 basis and had completed a number of qualifications as well as training in barbering. He was assessed as a model young person during his period on remand and it was thought that he could have a bright future ahead of him.

[13] The author of the CJSWR assessed him as being low in terms of risk, although a number of areas were assessed as moderate, namely peers, family relationships, alcohol use and possible external triggers within the community. There was a concern that he could behave in a similar manner if he were under the influence of alcohol and found himself in a similar situation. The likelihood of reoffending would reduce if he engaged with offence focused work and counselling.

[14] Since his admission to Kibble he had focused on his education and the staff thought very highly of him. He had not been involved in any aggression or violence and had acted maturely and calmly in situations which arose. He was engaging with the onsite forensic psychologist. It was reported that he had made a lot of progress and continued to do so. He wished to use his time in Kibble as a springboard to change the course of his life and do something positive. His mindset had dramatically changed.

The appeal

[15] It was submitted that the level of the appellant's culpability was low. Mr Rollinson's actions in grabbing the appellant's phone had led to the start of the physical assault. His stamping on the phone had caused the appellant to lose control. Insufficient weight had been given to this factor. The deceased was at risk of a sudden fatal cardiac event at any time and the death was not foreseeable.

[16] The appellant was only 15 at the time of the incident and 16 at the time of sentencing. He was assessed as low risk with some areas assessed as moderate. He had suffered multiple adverse childhood experiences including parental separation and witnessing domestic violence. He had pleaded guilty and demonstrated clear insight and remorse. He had made significant efforts towards rehabilitation. He had demonstrated a significant change in his character. Not enough weight was attached to the fact that he was a child. A proper application of the sentencing young people guideline would have resulted in a lower sentence. On any view the offence was at the lower end of the scale for culpable homicide.

[17] In submissions before us it was accepted that despite the level of harm, it was important to recognise the deceased's role. His actions exacerbated the incident. The judge described the assault by the appellant as frenzied after having seen CCTV footage, but it only caused minor blunt force injuries of the type seen daily in the Sheriff or JP Courts on summary complaint. While the judge said that it went too far to characterise the level of culpability as low, she did not state how she did characterise the level.

[18] The judge stated that she took the various factors referred to above into account but did not indicate how they impacted upon her assessment of the sentence. Remorse affected the headline sentence and was different from applying a discount because of a plea. According to the judge, it was too early to know whether the appellant's progress in Kibble

would be sustained but that did not give him enough credit. Greater weight should have been given to his capacity for change as vouched in the report from Kibble.

[19] While cases of culpable homicide were fact specific this case could be compared and contrasted with those of *Stewart and Noble* v *HM Advocate* [2012] HCJAC 103 and *Reid* v *HM Advocate* (unreported) 16 December 2010.

[20] As far as the latter case was concerned, the appellant was aged 16 at the time and was sentenced to 5 years detention, discounted from 7 years and 6 months. He had pleaded guilty to the culpable homicide of a delivery driver. His car had been surrounded by the appellant and others. They rocked the car and forced the deceased to exit. He was surrounded and forced against a wall. The appellant advanced towards him and punched him on the jaw, causing him to lose consciousness. He fell, hit his head on the pavement and died. The blow was likely to have been heavy and forceful. He was said to pose a high risk of reoffending but hoped to do courses and obtain employment. The deceased had shown no antagonism and there was no provocation in any sense. The blow was a culmination of serious aggression towards an innocent victim. In *Stewart and Noble*, Noble was 15 at the time and 17 at the time of sentence. He admitted repeatedly punching and kicking the deceased and stamping on his head. He jumped up and down on his head with full force. The deceased suffered a brain injury and was in hospital for 3 months and thereafter a nursing home. He never regained consciousness and died.

[21] Noble had a disciplinary record at school and was impulsive but he had improved. The violence he offered to the deceased was significantly greater than his co-accused whose sentence was reduced to 5 years. The sentencing judge had not placed enough weight on his age and the objective material vouching his developing maturity and progress. A sentence

of detention for 6 years was substituted for the 8 year period imposed by the sentencing judge.

[22] Senior counsel recognised that each case of culpable homicide was fact specific and the sentencing of a young person was particularly difficult. Nonetheless the sentence imposed in this case was outwith the range of reasonable sentences which could have been imposed. A key distinction was the nature of the assault. The injuries did not contribute to the deceased's death in the direct sense which they did in *Reid* and *Noble*.

[23] The reactions of the deceased went some way towards reducing the appellant's culpability.

[24] A different senior counsel had originally been instructed, the appellant's position always being that he would accept responsibility for whatever crime was appropriate. Counsel was no longer able to act after some months and passed the papers on. The new senior counsel met the appellant and tendered certain advice, including the wisdom of obtaining the opinion of a cardiologist. It was to be expected that a 15 year old would accept senior counsel's advice in that regard. The Crown had not even obtained an expert opinion.

Analysis

[25] As was clear from the discussion, the sentencing of culpable homicide, especially where young people are involved, is difficult. Each case is fact specific but some guidance can be obtained from other cases in at least a general sense. The question for this court is, as always, whether the sentence which was ultimately imposed represented a miscarriage of justice.

[26] We have considered carefully the submissions of counsel and have seen for ourselves the CCTV footage. It is plain that the appellant, who was by all accounts intoxicated, would

not take no for an answer. While the deceased Mr Rollinson grabbed his mobile phone and stamped on it, that provides no excuse or justification for the gross overreaction on the part of the appellant. While we note the nature of the injuries sustained by Mr Rollinson, we note also that the force was sufficient to break a bone in the appellant's hand. There was no aggression or group violence towards Mr Rollinson, as there had been in the case of *Reid*, but the assault on Mr Rollinson was a sustained one involving several blows. In addition, Mr Rollinson was acting in the course of his duties as a bus driver. Just as consideration was given in the *Reid* case to the protection of delivery drivers, the court must endeavour to protect people who provide a service to the public and can be in a vulnerable position. It is of significance that this is not the first time the appellant had assaulted a bus driver. Such conduct must be deterred.

[27] It is clear that rehabilitation and the best interests of the appellant must be considered by the court. The sentencing judge appears to have done just that. Despite senior counsel's able submissions, we are unable to say that she did not attach sufficient weight to these factors.

[28] While the cases of *Reid* and *Noble* were decided before the Sentencing Young People guideline came into effect, it must be recognised that the court already required to have regard to the age and maturity of offenders. In *Kane* v *HM Advocate* 2003 SCCR 749 the Lord Justice Clerk (Gill) at paras [11] and [12] stressed the distinct features of sentencing young offenders as including lower culpability and the desirability and greater prospects of rehabilitation. Similar themes had been identified in the Supreme Court of the United States as Lady Hale explained in *R. (Smith)* v *Secretary of State for the Home Department* [2006] 1 AC 159. She noted that a young offender's irresponsible conduct was less morally reprehensible than that of an adult. Juveniles had a greater claim to be forgiven for failing to

escape negative influences and had greater capacity for change. She set out her conclusions, which were immediately well-known to and recognised by sentencers in Scotland, at para [25]:

> "These considerations are relevant to the retributive and deterrent aspects of sentencing, in that they indicate that the great majority of juveniles are less blameworthy and more worthy of forgiveness than adult offenders. But they also show that an important aim, some would think the most important aim, of any sentence imposed should be to promote the process of maturation, the development of a sense of responsibility, and the growth of a healthy adult personality and identity. That is no doubt why the Children and Young Persons Act 1933, in section 44(1), required, and still requires, every court dealing with any juvenile offender to have regard to his or her welfare. It is important to the welfare of any young person that his need to develop into fully functioning, law abiding and responsible member of society is properly met. But that is also important for the community as a whole, for the community will pay the price, either of indefinite detention or of further offending, if it is not done."

[29] In the case of *Noble,* in particular, it was explicitly said in the opinion of the court, at para [24], that insufficient weight was put on the appellant's age and to the objective material dealing with his general developing maturity and educational progress. These considerations are very similar to those which have found their way into the guideline. The opinion of the court was delivered by Lord Carloway, who also delivered the opinion in the case of *Hibbard* v *HM Advocate* 2011 JC 149, the appellant Hibbard being 15 years of age at the time of the offence, in July 2009.

[30] In para [14] of *Hibbard* the court said the following:

> " … the court has no difficulty with the proposition that, when sentencing a child for any offence, the sentence selected ought to take into account, as a primary consideration, the welfare of the child and the desirability of his reintegration into society. It is not the only primary consideration, since the legislation requires that the seriousness of the offence be taken into account and that the period selected satisfies the requirement for retribution and deterrence. But it is one. In this way, the sentencing of a child will differ in the degree of emphasis or weight placed on the welfare of the person sentenced."

[31] Para [15] is in the following terms:

> "In a sense therefore, it is correct to say that the sentencing process should not simply involve an exercise of looking at past cases involving adult offenders committing similar crimes and then deducting a percentage, which is deemed appropriate to differentiate adult from child, from the level of the adult sentence. Nevertheless, if precedents for similar crimes involving adults on the one hand and children on the other are analysed, there is bound to be a recognisable arithmetical difference in the two levels. Those for a child will be proportionately lower, even if the exercise had not involved a direct comparison. It is not illegitimate, therefore, for a court to look at the sentences for adult offenders, since by doing so it will gain some knowledge of the recognised levels. With that information, it will realise that any sentence imposed on a child, with his welfare as a primary consideration, ought normally to be significantly below those levels …"

[32] It seems to us, in view of the foregoing, that the sentences in *Reid* and *Noble* were likely to have been the same even had the guideline been in force.

[33] It is plain that the violence inflicted by Mr Noble was more significant than that inflicted by the appellant in this case. However, that has to be weighed against the appellant's previous history of engaging with a bus driver and the very fact that a bus driver was targeted, as we have indicated.

[34] In addition, it is equally plain that the discount, while a matter for the discretion of the sentencing judge, was excessive, given the passage of time between appellant's appearance on petition and the tendering of the plea. In *Geddes* v *HM Advocate* [2015] SCCR 230, the court considered that a plea of guilty 3 months after first appearance was not intimated at the earliest opportunity and deemed an allowance of 25% appropriate. Making due allowance for the age of the appellant in this case and what we were told by senior counsel, we are satisfied that a discount of no more than 25% would have been appropriate. That means that the sentence which was in fact imposed is not out of step with the authorities to which reference has been made.

[35] The sentence is not excessive. There has been no miscarriage of justice and the appeal is refused.