SPENCE v HM ADVOCATE

No 16
09 November 2007
[2007] HCJAC 64

Lord Justice-General (Hamilton),
Lord Nimmo Smith and
Lord Carloway

PAUL SPENCE, Appellant—*Carroll (Solicitor-advocate)*
HER MAJESTY'S ADVOCATE, Respondent—*McConnachie QC, A-D*

Sentence – Appellant charged with murder and offering to plead guilty to culpable homicide – Crown rejecting plea and appellant proceeding to trial with defence of self-defence – Appellant convicted of culpable homicide – Whether any discount fell to be applied standing willingness to offer plea at earlier stage – Du Plooy v HM Advocate – Criminal Procedure (Scotland) Act 1995 (cap 46), sec 196

Section 196 of the Criminal Procedure (Scotland) Act 1995 provides that, in determining what sentence to pass on an offender who has pled guilty, the court may take into account the stage in the proceedings at which he indicated his intention to plead guilty.

The appellant was charged with murder by stabbing, and indicted for trial in the High Court of Justiciary. His agents wrote to the Crown prior to the preliminary hearing enquiring of the Crown position were the appellant to offer a plea of guilty to the lesser charge of culpable homicide. The Crown indicated such a plea would not be acceptable. The appellant appeared at a preliminary hearing, confirmed a plea of not guilty to the indictment and lodged a special defence of self-defence. Following further procedure, the appellant was indicted for trial which commenced on 10 May 2007. On that date the appellant's representative informed the trial Advocate-depute that the appellant ''would plead guilty to culpable homicide'', which plea was rejected by the Advocate-depute. The appellant adhered to his plea of not guilty and to the special defence previously lodged, and proceeded to trial. On 16 May the jury returned a verdict of guilty to the implied alternative of culpable homicide. The trial judge later sentenced the appellant to eight years' detention, having regard to: (1) the appellant's age (18 years old); (2) his relative lack of previous offending; (3) his good employment history; and (4) the fact that he was convicted of an offence to which he had been willing to plead guilty at an earlier stage. The appellant appealed against that sentence and argued that the sentence had been excessive having regard to: (1) the appellant's youth and personal circumstances; and (2) the inadequacy of any discount standing the appellant's offers to plead guilty.

Held that: (1) sec 196(1) was not restricted to situations in which a plea had been accepted by the Crown. The appellant in this case could, at the preliminary hearing or trial diet, have pled guilty to culpable homicide and even if not accepted by the Crown, that plea would have been recorded. There was no reason why sec 196 should not apply in such circumstances (para 9); (2) sec 196 required an ''unequivocal indication'' on the part of the accused of his intention to plead guilty and to have value that intention must have been adhered to throughout the proceedings (para 10); (3) such an intention need not, contrary to the submission of the Crown, be accompanied by a narration of the circumstances of the offence and any mitigation. Such considerations may have a bearing on ''the circumstances in which that indication [was] given'' (sec 196(1)(b)) (para 11); the sentencing judge had erred in this case in giving any discount in sentence in respect of the appellant's indications of a willingness to plead guilty at earlier stages (para 16); and appeal refused and sentence of eight years' detention *quashed* and sentence of ten years' detention *substituted*.

Observed that: (1) the extent of any discount will be on a sliding scale ranging at its greatest from one-third, or in exceptional circumstances possibly more, to nil (para 14); (2) the utilitarian value of any plea will be influenced by, *inter alia*, the extent of public resources expended in preparing for and presenting a case

at trial (para 14); (3) where a clear indication of an intention to plead guilty is given before the service of an indictment (for example, under the procedure prescribed by sec 76 of the Criminal Procedure (Scotland) Act 1995) a discount in the order of one third might be afforded (para 14); (4) an indication given at the first calling of a case might attract a discount of one-quarter (para 14); (5) thereafter any discount would reduce further and a plea at the trial diet should not ordinarily attract a discount in excess of one-tenth and may be less or nil (para 14); (6) these broad figures were for guidance only and are not prescriptive, the amount of any discount in a particular case being dependent on its own circumstances (para 15).

Roberts v HM Advocate 2005 SCCR 717 *disapproved*.

PAUL SPENCE was charged on an indictment at the instance of the Right Honourable Elish F Angiolini QC, Her Majesty's Advocate, the libel of which set forth a charge of murder. The appellant went to trial before Lord Matthews and a jury at the High Court of Justiciary in Glasgow and was convicted of the implied alternative of culpable homicide on 16 May 2007. The appellant was later sentenced to eight years' detention. The appellant appealed to the High Court of Justiciary against that sentence.

Cases referred to:
Advocate (HM) v Alexander [2005] HCJAC 77; 2005 SCCR 537
Advocate (HM) v Booth 2005 SLT 337; 2005 SCCR 6
Advocate (HM) v Speirs 1997 SLT 1401; 1997 SCCR 479
Advocate (HM) v Thomson and Dick [2006] HCJAC 32; 2006 SCCR 265
Du Plooy v HM Advocate 2005 1 JC 1; 2003 SLT 1237; 2003 SCCR 640
Gardiner v HM Advocate, 17 August 2007, unreported
Roberts v HM Advocate [2005] HCJAC 105; 2005 SCCR 717

The appeal called before the High Court of Justiciary, comprising the Lord Justice-General (Hamilton), Lord Nimmo Smith and Lord Carloway, for a hearing on 12 October 2007.

At advising, on 9 November 2007, the opinion of the Court was delivered by the Lord Justice-General (Hamilton)—

OPINION OF THE COURT— [1] The appellant, who was charged with the murder of John Purcell, was convicted of culpable homicide. He was sentenced to eight years' detention in a Young Offenders Institution. He has appealed against that sentence. Regard being had to the procedural history of the case, it was decided that it might justify guidance being given by the court (in furtherance of sec 118(7) of the Criminal Procedure (Scotland) Act 1995) as to the matter of sentence in circumstances where an accused had, it was said, offered to plead to a lesser charge (in this case to culpable homicide when charged with murder) and in the event had been convicted of that lesser charge. The Lord Advocate, at the invitation of the court, lodged written submissions on the general issues arising and the Advocate-depute was heard in elaboration of these.

[2] In the late evening of 23 September 2006 the now deceased was making his way to his mother's house along Easterhouse Road in Glasgow. He came upon an altercation between two gangs of youths, known respectively as the 'Den Toi' and the 'Aggro'. Fights between these gangs, involving the use of weapons, were, it appears, a regular disfigurement of life in Easterhouse. Part of what subsequently occurred was filmed on a CCTV camera. The appellant's representative invited us to view that video, which we did. The deceased can be seen within the group comprising the Den Toi gang. Some of the members of that group appear to be shouting (presumably abuse) in the direction of other persons outwith the view of

the camera. Some at least of the Den Toi group can be seen to have weapons — a large stick is evident and a weapon (possibly a sword) is taken from a vehicle. The person identified as the deceased is then seen to leave the group and walk, out of camera, in the general direction of where the rival group may be supposed to be. He is not carrying anything. Shortly thereafter the members of the Den Toi gang are seen to begin running in the same direction. Almost immediately the deceased comes back into camera view, staggering. By that time he had obviously sustained the stab wound from which he subsequently died.

[3] The appellant is 18 years of age. He was aged 17 in September 2006. He has no previous convictions, with the exception of one for assault by spitting — which can be disregarded for present purposes. The evidence was unclear as to what precisely were the appellant's actions prior to his encounter with the deceased. There was testimony, however, before the jury that he had earlier been fighting along with the Aggro gang and, from more than one witness, that he was then armed with a knife. The deceased, who was unarmed, was stabbed by the appellant with that knife, a single blow penetrating through his left arm and entering the chest horizontally. The total length of the wound was five inches. At least moderate force would have been required to inflict it.

[4] On 3 October 2006 the appellant appeared on petition charged with murder. He was remanded in custody. On 8 December 2006 he was indicted to a preliminary hearing of the High Court at Glasgow set for 10 January 2007. On 19 December 2006 an agent acting for him wrote to the procurator fiscal, Glasgow under reference to his case as follows:

> 'I refer to the above and confirm that I act for Mr. Spence in this case. I am writing to enquire as to whether the Crown has considered its position in the event that a plea of guilty to culpable homicide were proposed. I shall be obliged if you will acknowledge safe receipt and let me know the position. The defence post mortem report indicates that the person who committed the stabbing may not have intended to kill. I look forward to hearing from you with regard to the above'.

In reply the Advocate-depute then responsible for the preparation of the case advised the defence that a plea of culpable homicide would not be accepted by the Crown. Thereafter the appellant appeared, legally represented, at the preliminary hearing on 10 January. He pled not guilty to the charge and acknowledged that he was fully aware of the terms of sec 196 of the 1995 Act (sentence following guilty plea). A special defence of self-defence was lodged on his behalf. Preparations for the trial were discussed. On the motion of the appellant's representative the preliminary hearing was continued until 9 February. On that date a further continuation of the preliminary hearing to 5 March was sought by the defence and granted and the court assigned 3 May as the date of trial. In the event the trial commenced on 10 May. On that date the appellant's representative informed the trial Advocate-depute that the appellant 'would plead guilty to culpable homicide'. The trial Advocate-depute rejected that offer. No further discussion took place between parties' representatives. When the case was called the appellant intimated to the court that he adhered to his plea of not guilty and adhered to the special defence previously lodged. The trial proceeded on 10, 11, 15 and 16 May. On that last date the jury returned against the appellant a verdict of culpable homicide. It also deleted from the libel the averment that he did 'repeatedly attempt to strike [the deceased] on the body'. No issue of provocation was raised at the trial, the

inference to be drawn from the verdict being that the jury was not satisfied that the appellant intended to kill the deceased or that he acted with wicked recklessness.

[5] In his report to us the trial judge observes that in sentencing the appellant he took full account of his youth, his relative lack of offending, his employment history (which was good) and the reports which had been obtained (a social enquiry report and a psychological report). He continues:

> 'I also had regard to the fact that he was convicted of an offence to which he had been willing to plead guilty at an early stage. He had made a number of efforts through his agents to persuade the Crown to accept such a plea'.

[6] The solicitor-advocate for the appellant submitted that, while the plea of self-defence had been rejected by the jury, it had been arguable. It was not suggested that the appellant's action against the deceased was justified by any need to defend himself against an onslaught by armed members of the Den Toi gang. The defence was, it seems, founded on a remark, said to have been made to the police by a witness, to the effect that the deceased was 'gesturing towards the Aggro to come ahead' (the witness in evidence had no recollection of making that remark).

[7] The trial judge allowed the special defence to go to the jury. It is unnecessary for us to express a view as to whether he was right to do so. We observe only that on the information before us we are unsurprised that the jury rejected that plea.

[8] The solicitor-advocate for the appellant founded his contention that the sentence imposed was excessive on two bases: first, the youth and personal circumstances of the appellant and the 'low level of violence' used and, second, the inadequacy of any discount for the appellant's offers to plead guilty. In relation to the first basis, reference was made to *Gardiner v HM Advocate* and to *HM Advocate v Speirs*. In relation to the second, reference was made to *Du Plooy v HM Advocate* and *HM Advocate v Booth*.

[9] Section 196(1) of the 1995 Act (as amended) provides:

> 'In determining what sentence to pass on, or what other disposal or order to make in relation to, an offender who has pled guilty to an offence, a court shall take into account–
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> (a) the stage in the proceedings for the offence at which the offender indicated his intention to plead guilty, and
> (b) the circumstances in which that indication was given.'

In *Du Plooy v HM Advocate* and the related cases the court was concerned with situations where, at certain stages, each of the accused had pled guilty and those pleas had been accepted by the Crown. In *Roberts v HM Advocate* (para 10), the court opined:

> '[T]he reference in section 196(1) to ''an offender who has pled guilty to an offence'' must be a reference to an offender whose plea of guilty has been accepted by the prosecutor. That appears to us to follow from the language used in the section.'

Although it will commonly be the case that the court, in implementing sec 196(1), will be concerned with a situation where a plea of guilty has been accepted by the Crown, we doubt whether the statute is in terms restricted to that situation. At any diet, whether a preliminary (or first) hearing or a trial diet, an accused may plead guilty to the charge as a whole or on a restricted basis (including to a lesser offence

within the scope of the charge). In this case the appellant, if so advised, could, at the preliminary hearing or at any continuation of it or at the trial diet, have pled guilty to culpable homicide. Had he done so, his plea to that effect, even if not accepted by the Crown, would have been duly recorded. We see no reason why sec 196 (as amended) should not apply in such circumstances. In that regard we disagree with the opinion to the contrary expressed in *Roberts*. In any event, even if the section does not strictly apply, in such a situation very similar considerations in relation to discounting would, in our view, arise in circumstances where, such a restricted and recorded plea not having been accepted by the Crown, the jury in the event returned a restricted verdict.

[10] It was stated for the appellant that the letter of 19 December 2006 was in 'standard format'. If that be so, it should be recognised that a letter in such terms is of no value for the purposes of securing a discount for an early plea. It does no more than enquire what would be the Crown's position in the hypothetical event that a plea of guilty to culpable homicide were advanced. Section 196 speaks of the stage at which the offender 'indicated his intention to plead guilty'. What is required is 'an unequivocal indication of the position of the offender' (*HM Advocate v Booth*, para 21). Moreover, to have value that intention must be adhered to throughout the proceedings and be appropriately vouched. That, as we have said, can be done, after the indictment has been served, by tendering the plea and having it recorded at the procedural hearing and adhering to that position thereafter. Prior to the service of the indictment an intention to plead guilty on a restricted basis can be intimated by letter. Such action is indicative of acceptance by the accused of guilt (albeit to a limited extent). By contrast, in the present case, the appellant not only adhered throughout the proceedings to his plea of not guilty but lodged and insisted in a defence of self-defence. The choice (to plead guilty to culpable homicide or to seek an acquittal) was open to the appellant. 'That is the choice he must make. He cannot have it both ways.' (*HM Advocate v Thomson and Dick*, para 27.)

[11] The Advocate-depute submitted that, to have any value, there would not only require to be a clear and unequivocal indication of an intention to plead guilty to culpable homicide but the narration of the circumstances of the offence and of any mitigation to be advanced would require to be clear. We reject that submission. Accused persons accepting of their guilt on a restricted basis are, of course, to be encouraged to disclose the basis of such acceptance. Such disclosure may be necessary to allow the Crown to make an informed decision as to whether or not to accept a restricted plea. It may accordingly bear on 'the circumstances in which that indication is given' (sec 196(1)(b)). Refusal to make such disclosure where reasonably required may reduce the utilitarian value of the plea and thus the discount to be allowed. But it is not of no value.

[12] In some circumstances it may not be possible to divine from the jury's verdict precisely on what basis it has returned a restricted verdict. Likewise, if the basis for the restricted plea has not been disclosed, there may be an additional difficulty in correlating the plea to the ultimate disposal. In such circumstances the court will simply have to assess the situation as best it can and make, or decline to make, the discount accordingly.

[13] In *Du Plooy v HM Advocate* (para 26), the court stated:

> 'Since the significance of the timing and circumstances of the tendering of the plea of guilty, the practical consequences of the plea and any related matters

> will vary, it would not be appropriate for there to be a fixed or ''normal'' discount. What should be the discount in the individual case is plainly a matter for the discretion of the sentencer. For the same reason we do not consider it appropriate to indicate a maximum or a minimum discount. However, we consider that the discount should normally not exceed a third of the sentence which would otherwise have been imposed. In any particular case, the discount may well be less than that proportion, or none at all. There may, on the other hand, be exceptional circumstances which would justify a greater discount.'

[14] Since *Du Plooy v HM Advocate* there has been substantial experience in the High Court and in the sheriff court of implementation of the guidance given in that case. There have been some inconsistencies. We are of opinion that there would be advantage in now giving some general guidance as to the levels of discount which might, subject to individual circumstances, be expected in the event of an intention to plead guilty being clearly indicated at particular stages in solemn proceedings and thereafter adhered to. The extent of the discount will be on a sliding scale ranging at its greatest from one third, or in exceptional circumstances possibly more, to nil. The utilitarian value of an early plea will be influenced by, among other things, the extent of the public resources which will be expended in preparing a case for trial and presenting it at trial. After an accused has appeared on petition, investigation and preparation will to an increasing extent be undertaken by the Crown prior to the service of an indictment. Among other courses open to an accused person during that period is the giving of written intimation to the Crown under sec 76 of the 1995 Act of his intention to plead guilty and his desire to have his case disposed of at once. If a clear indication of an intention to plead guilty is given during that period (and is adhered to), we would expect that a discount in the order of one third might be afforded. Such an indication at the first calling of a case at a preliminary hearing (or in the sheriff court at a first diet) might attract a discount in the order of one quarter. Thereafter, any discount can be expected to reduce further. A plea at the trial diet should not ordinarily exceed one tenth and in some circumstances may be less than that or nil. The extent of any discount allowed should be recorded in the court minutes.

[15] These broad figures are intended for guidance only. They are not prescriptive, the amount of the discount (if any) in a particular case being dependent on its own circumstances. Special circumstances may apply to very short and to very long sentences, as they do to the fixing of punishment parts in indeterminate sentences (*HM Advocate v Alexander*).

[16] The trial judge, as we have noted, had regard to the fact that the appellant 'was convicted of an offence to which he had been willing to plead guilty at an early stage. He had made a number of efforts through his agents to persuade the Crown to accept such a plea.' It is unclear to what extent that factor affected the sentence which the trial judge imposed. In our view, regard being had to the history of this case which we have narrated, no mitigation of sentence was appropriate by reason of any of the steps taken as regards a plea by the appellant prior to conviction.

[17] The sentencing judge having erred in that respect, it remains for us, due regard being given to the factors urged in support of the appeal against sentence, to decide what is the appropriate disposal in this case.

[18] The appellant is a young man and, in effect, a first offender with a good employment record. A recent psychological assessment places him at a low risk of future violence if released from prison at this time. Since his incarceration he has

attended group sessions, including one addressing the carrying and use of offensive weapons; he responded positively to those sessions. Nonetheless, the court cannot but take into full account the nature of the appellant's offending on 23 September 2006. From his own account to the psychologist he was, while in his home, alerted by a brother to the existence of a gang disturbance. He left his house and took possession of a knife from another person in the street. He associated himself with a gang. Thereafter he used the knife, in circumstances where self-defence was disproved and provocation was not suggested, against another man, taking his life. The single blow, although directed at the victim's arm, was of sufficient force to pass through it and enter the victim's chest. These circumstances are very different from those in the two cases cited by the solicitor-advocate for the appellant.

[19] The carrying and the use of knives are matters of grave concern to all right-thinking people in our community. When an individual voluntarily arms himself with a knife and deliberately uses it upon an unarmed person, in circumstances where his action is neither justified nor mitigated by provocation, so as to kill that other, he must expect that the community through the court will take a very serious view of that conduct. In many circumstances the appropriate sentence will run significantly into double figures of years of custody. In the present case, and having due regard to the circumstances of the appellant and of the offence, we are far from persuaded that the sentence imposed was excessive. Rather, we regard it as inadequate. The sentence of eight years in a Young Offenders Institution will be quashed and a sentence of ten years in that institution substituted.

THE COURT refused the appeal.

McClure Collins – Crown Agent