APPEAL COURT, HIGH COURT OF JUSTICIARY

[2017] HCJAC 82
HCA/2017/000466/XC

Lord Justice Clerk
Lord Brodie
Lord Turnbull

OPINION OF THE COURT
delivered by LORD BRODIE

in

APPEAL AGAINST SENTENCE

by

HER MAJESTY'S ADVOCATE

Appellant;

against

CH

Respondent:

Appellant: A Prentice QC (sol adv); Crown Agent
Respondent: A Ogg Solicitor Advocate; J C Hughes & Co, Glasgow

15 November 2017

Conviction, sentence and Crown appeal

[1] The respondent was indicted in the High Court on four charges. On 17 May 2017 he pleaded guilty to charges 002 and 003 on the indictment, subject to certain amendments. His pleas of not guilty to charge 001 and charge 004 were accepted by the Crown. The charges to which the respondent pleaded guilty were in the following terms:

> "(002) on 11 October 2016 at [*an address in Glasgow*] you … did penetrate with your penis the mouth of [*RC*] … a child who had not attained the age of 13 years, cause him to masturbate you, masturbate yourself, and you did rape him:
> CONTRARY to Section 18 of the Sexual Offences (Scotland) Act 2009;
>
> (003) on 11 October 2016 at [*the same locus*] you … did take or permit to be taken or make indecent photographs of [*RC*], a child, born [*in February 2013*] … namely a video recording:
>
> CONTRARY to the Civic Government (Scotland) Act 1982, Section 52(1)(a) as amended".

The sentencing judge adjourned the diet for the preparation of a criminal justice social work report and thereafter a psychiatric report. On 20 July 2017 she imposed a *cumulo* sentence of three years and nine months' imprisonment. The sentence was discounted from five years' imprisonment to reflect the respondent's guilty plea. The respondent was also made subject to the notification requirements under Part 2 of the Sexual Offences Act 2003 for an indefinite period. On 4 August 2017 the Crown lodged an appeal against sentence on the grounds of undue leniency.

The agreed narrative

[2] An agreed narrative was presented to the sentencing judge as follows. The respondent was a good friend of the complainer's father, JC. Both the respondent and JC were unemployed. Prior to the offences, the respondent and JC would see each other on a daily basis. Although they would regularly visit each other's homes, the respondent had never been left alone with the complainer. The complainer, RC, was aged three years and 8 months at the time of the offences. He lived with his father, JC; his mother, DM; and his older brother, who was aged nine, in a flat in Glasgow.

[3] On the day of the offences JC was at home with RC and his elder brother. RC's brother was off school sick. Their mother was at work. The respondent arrived at the flat in

the late morning where he played computer games in the sitting room with JC. During this time, the complainer RC was in his parents' bedroom playing on his tablet; his brother was in his own room playing on a games console. At around 2pm JC left the flat to meet his partner, DM, from her work. JC left the respondent alone in the flat with both RC and his elder brother.

[4] Almost immediately after JC left the flat, RC found himself alone with the respondent in the living room. It is not clear from either the sentencing judge's report or the agreed narrative why RC moved from his parents' bedroom into the sitting room to be with the respondent, but nothing turns on this point. The respondent proceeded to penetrate the complainer's mouth with his penis. Whilst doing so, he filmed the act using his mobile phone.

[5] The mobile phone recording which was subsequently recovered showed the complainer taking hold of the respondent's erect penis, placing it in his mouth and masturbating the respondent. The complainer is heard on the footage saying "I want to see the camera". The respondent replies "Quick, quick. Before your daddy comes". The footage continues to show the complainer holding up a toy in his hand. The respondent then places his penis in the complainer's mouth again (despite the fact that the respondent's plea of guilty to charge 002 was accepted under deletion of the libel that he repeatedly raped the complainer). The footage shows the complainer again masturbating the respondent, before the respondent begins masturbating himself. The respondent can be heard on the video footage calling the complainer "a good boy". Whilst his penis is in the complainer's mouth, he tells him to "watch his teeth" and "not to bite". The complainer can be heard to gag at one point. The video footage lasted for about five minutes.

[6] During the offence, the complainer's elder brother remained in his room playing computer games. DM finished her work at 3pm and returned home soon after with JC. They found the respondent sitting on a couch in the sitting room with the complainer's brother, who was playing a computer game. The complainer was not in the sitting room and DM assumed he was in her bedroom playing on his tablet. There was some brief conversation between the adults before the complainer ran into the sitting room and said "I ate your friend's pecker" ("pecker" being the word the family used for penis). The complainer pointed at the respondent as he said it. DM asked the complainer what he meant and he again stated "I ate his pecker". The respondent became irate; he started waving his arms around and accused the complainer of "being bad" by pulling his trousers down. The respondent was very angry. He said "am [*sic*] no having this" and swore at the complainer. DM told the respondent not to swear at her son. JC then dragged the respondent out of the flat. Once outside the respondent ran away, leaving behind his two mobile phones and his jacket. As he had left, DM questioned her son further about the incident. The complainer repeated what had happened and said it had been "disgusting". The complainer's parents contacted the police.

[7] Police attended at the family's flat in the early evening. The complainer was forensically examined later the same evening at hospital. The respondent's semen was found in an oral swab. The complainer was later taken to a local police station and a joint investigative interview was conducted. The relevant video footage was subsequently recovered from the respondent's mobile phone.

The respondent's personal circumstances and background reports

[8] The sentencing judge had before her a criminal justice social work report relating to

the respondent ("the CJSWR"), a report from the Clyde Quay Project (a specialised sex offenders' programme), and a psychiatric report regarding the respondent's mental state and attitude towards the offence which the judge had ordered on the recommendation of the author of the CJSWR.

[9] The respondent was aged 28 at the date of the offences and was a first offender. He had experience of employment but prior to being remanded he had been unfit for work due to incapacitating chronic cluster headaches for which he receives medication. At the time of the offences he lived with his long-term partner and her 16 year old son. This relationship had lasted for 11 years but had come to an end when the respondent's partner became aware of the charges to which the respondent pleaded guilty. The respondent was, prior to being remanded on pleading guilty to these offences, residing in homeless accommodation.

[10] The respondent had considerable difficulty in explaining his conduct. His position was that at the time of the offences he had consumed drugs (Valium and Ketamine), which had had a disinhibiting effect, and he had little recollection of the incident. He maintained that his memory was vague and unreliable. The CJSWR records that the respondent initially denied being sexually attracted to children but later briefly admitted to having sexual fantasies of a paedophilic nature, which admission he then quickly retracted. When pressed, the respondent accepted that "I have got some issues; I think that I must have sexual fantasies towards children." He admitted to having been sexually aroused by the complainer at the time of the offences to which he had pleaded guilty. It was the opinion of the author of the CJSWR that the respondent's position that he had never intended sexually to assault the complainer was implausible and misleading. He had no doubt that the offences were committed for the respondent's sexual and emotional gratification. The author concluded that the respondent had failed to take ownership of his offending, was

lacking in genuine empathy and had said little which suggested that he had any meaningful understanding of the emotions, and had distorted thinking and motivations which might have led him to the rape of the complainer.

[11] Both the CJSWR and the Clyde Quay Project report contain assessments of the likelihood of reoffending by the respondent. Having identified the assessment tool used as the Thornton Risk Matrix 2000 and having given a brief description of how the tool is used to evaluate risk by reference to static and aggravating factors, the author of the latter of these reports assessed the respondent as at medium risk of sexual reconviction. The author of the CJSWR, on the other hand, assessed the respondent as being at high risk of reoffending. On this matter of risk we have preferred the assessment in the Clyde Quay Project report. First, although we note that the authors based their respective reports on one interview of the respondent carried out jointly and, we would assume collaboratively in consultation one with the other, the Clyde Quay Project is the specialist resource in respect of men convicted of sexual offences. Second, while the terms of the Clyde Quay Project report suggest to us that a full assessment using the Thornton Risk Matrix 2000 was carried out, we are less confident about the basis of the assessment which is referred to in the CJSWR. At section 4(b) of the CJSWR it is narrated that a Level of Service/ Case Management Inventory ("LSCMI") has been completed in connection with the preparation of the report. We beg to doubt whether that is strictly accurate. We are aware from our collective experience that the LSCMI is validated as a useful assessment tool but employing it requires a rigorous questioning of a subject with a view to exploring a large number of potentially relevant factors, a demanding exercise requiring more than an hour to complete. The LSCMI requires particular training if it is to be used effectively. There is available, however, a more easily used screening version of the LSCMI which confines itself to a much more limited list

of criminogenic and protective factors. It is accordingly a more superficial instrument than the LSCMI. The risk assessment is found in section 7 of the CJSWR. There it is narrated that the respondent's score was informed by his previous convictions, unemployment status, tendency to abuse illicit substances, lack of familial and pro-social peer support and concerns generated by his involvement in the current offences. These are the factors addressed in the screening version of the LSCMI tool.

[12] The author of the psychiatric report had no recommendations to make. She found there to be no mental health reasons why the respondent would not be fit for any disposal the Court deemed appropriate.

The sentencing judge's reasoning

[13] The sentencing judge acknowledges that she found the sentencing exercise particularly difficult in this case. She considered the oral rape of a very young child to be a very serious offence which required a substantial prison sentence. The offence was aggravated by the breach of trust which the complainer's father had reposed in the respondent and by its opportunistic nature. The sentencing judge also notes that the offence was of a short duration but that the opportunistic nature of the offence was suggestive of a pre-existing sexual interest in children. This, and the nature of the offence itself, raised an issue of risk; however, the sentencing judge was not satisfied that an extended sentence was necessary or appropriate (report, paragraphs [14] to [16]).

[14] The sentencing judge notes that the offence appeared to be an isolated incident. Despite her earlier observation that the opportunistic nature of the offence suggested that the respondent had a pre-existing sexual interest in children, she observes that there was no suggestion of any actual history of prior sexual interest in children. The respondent

appeared as a first offender at the age of 29. He had a stable background and had been in a long-term relationship with his partner for about 11 years. During this time, no concerns had been raised about the respondent's behaviour towards his partner's child (report, paragraph [17]).

[15] The sentencing judge recognises that no adequate explanation had been provided by the respondent for his conduct. It seemed that he was confused, distressed and in denial about his offending. The sentencing judge notes that the respondent's accounts to the authors of the criminal justice social work report and the report from the Clyde Quay Project were contradictory and confused. The respondent appeared to veer from admitting to a sexual interest in children to complete denials of such interest. The sentencing judge does not consider any of what he said to be reliable. It was clear that he had yet fully to take responsibility for his conduct. At the same time, however, the respondent did express a positive attitude towards engaging in programmes to address his conduct (report, paragraph [18]).

[16] The psychiatric report merely agreed with the background reports as to risk and rehabilitation; however, it also reported that the respondent was "disgusted" by his conduct and said that he needed help. The sentencing judge decided that, in the circumstances of the case, a long-term finite sentence would require the respondent to address his conduct within prison, thereby affording the public sufficient protection from him (report, paragraphs [19] and [20]).

Note of appeal and submissions

Appellant

[17] In the Crown Note of Appeal it is submitted that the *cumulo* sentence of three years

and nine months' imprisonment was unduly lenient. It is submitted that in all the circumstances the sentence fails to recognise the gravity of the offences, which involved a significant breach of trust and which were committed against a very young child. The offences were committed in the complainer's family home and the act of oral rape was recorded by the respondent on his mobile phone. It is submitted that the sentence failed to satisfy the need for retribution, deterrence, and protection of the public. The note of appeal concludes:

> "In all of the circumstances the sentence imposed fails to recognise the gravity of the offences, which involved a significant breach of trust against a very young child, in the family home, perpetrated along with recording of the offence. The sentence imposed failed to satisfy the need for retribution and deterrence and the protection of the public. The circumstances of the offence and the offender required that in addition to a substantial period of imprisonment there be an extended period of supervision for the protection of the public" (paragraph 6).

[18] In developing his submissions under reference to the Crown's written case and argument, the advocate depute drew attention to the assessments of risk of reoffending made by the authors of the CJSWR and the Clyde Quay Project report. Whereas the sentencing judge had described the offending as short-lived, the duration of the rape lasted for a period of five minutes until the emission of semen upon the child. This was quite a long period over which the child complainer was subjected to a significant sexual assault. It was an aggravating rather than mitigating feature of the case. The sentencing judge had not recognised that. An additional significant aggravation to which the sentencing judge had not had proper regard was the fact that the respondent had filmed his commission of the acts referred to in charge 002. While it was not known why he had chosen to do so, it could be presumed that it was for the purpose of subsequent viewing. There were further aggravations, as had been set out in the Crown's written case and argument: the young age

of the child complainer, the fact that the rape had been perpetrated in the complainer's family home with his sibling in an adjacent room at the time of the offending, the breach of trust involved.

[19] The Sentencing Council for England and Wales has issued sentencing guidelines to the courts in relation to sexual offences in that jurisdiction (the *Sexual Offences Definitive Guideline*). These guidelines may be referred to in order to produce a comparator which might be used as a cross-check of sentences selected in Scotland: *HM Advocate* v *AB* 2016 SCCR 47, Lord Justice Clerk Carloway at para 13. Were those guidelines to be applied in respect of the offence in England and Wales which corresponds to charge 002 in the present case (*viz*. rape of a child under 13, under section 5 of the Sexual Offences Act 2003) they would result in a characterisation of the case at level 2A for culpability and harm, having regard to the aggravating features of age of the child, abuse of trust, recording of the offence and ejaculation, and a consequent sentence in the range of 11 to 17 years' imprisonment, with a starting point of 13 years' imprisonment: *Definitive Guideline* at pages 27 to 31.

[20] The advocate depute noted the doubts expressed by the sentencing judge in her report as to the competency of an appeal against a decision not to impose an extended sentence. In his submission her concern was misplaced; the failure to impose an extended sentence in circumstances where it was required was simply an example of the extent to which the Crown contended that the sentence which was imposed was unduly lenient.

Respondent

[21] On behalf of the respondent, Ms Ogg reminded the Court of the exposition of the statutory test for an appeal against sentence at the instance of the Lord Advocate (that "the disposal was unduly lenient") that appears in *HM Advocate* v *Bell* 1995 SCCR 244 at 250D. It

means that for a Crown appeal to succeed the sentence 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. Applying that test, it could not be said that a sentence based on the selection of a headline figure of five years' imprisonment was unduly lenient. The sentencing judge had had regard to all relevant factors. If one reviewed the disposals which had been adopted in the cases which were included in the list of authorities provided by the Crown: *HM Advocate* v *Hamilton 2003* GWD 19-581, *HM Advocate* v *JT* 2004 SCCR 619, *Tough* v *HM Advocate* 2012 HCJAC 119, *HM Advocate* v *SSK* 2016 SCCR 74, and *HM Advocate* v *AB*, the sentence under appeal did not appear to fall outside the range of sentences which could be considered appropriate. The figure which the advocate depute had suggested would be produced by an application of the *Definitive Guideline* was excessive. It did not allow for mitigating factors. This was an isolated offence. It did not demonstrate manipulation or pre-planning. As appeared from the background reports, the respondent had recognised the seriousness of his offending. He had understood the impact on the complainer. There was no basis for the imposition of an extended sentence. The appeal should be refused.

Discussion

Competency of appeal

[22] Section 108 of the Criminal Procedure (Scotland) Act 1995 provides, inter alia:

> "**108.— Lord Advocate's right of appeal against disposal**.
>
> (1) Where a person has been convicted on indictment, the Lord Advocate may, in accordance with subsection (2) below, appeal against any of the following disposals, namely—
>
> (a) a sentence passed on conviction;

(b) a decision under section 209(1)(b) of this Act not to make a supervised release order;

(c) a decision under section 234A(2) of this Act not to make a non-harassment order;

(ca) a decision under section 92 of the Proceeds of Crime Act 2002 not to make a confiscation order;

(cb) a decision under section 22A of the Serious Crime Act 2007 not to make a serious crime prevention order;

(cb) a decision under section 36(2) of the Regulatory Reform (Scotland) Act 2014 not to make a publicity order;

(cc) a decision under section 41(2) of that Act not to make a remediation order;

(cd) a decision under section 97B(2) of the Proceeds of Crime Act 2002 to make or not to make a compliance order;

(cd) a decision under section 30(2) of the Health (Tobacco, Nicotine etc. and Care) (Scotland) Act 2016 not to make a remedial order,

(ce) a decision under section 30(2) of that Act not to make a publicity order,

(dd) a drug treatment and testing order;

(f) a decision to remit to the Principal Reporter made under section 49(1)(a) of this Act;

(g) an order deferring sentence;

(h) an admonition; or

(i) an absolute discharge.

(2) An appeal under subsection (1) above may be made—

…

(b) where it appears to the Lord Advocate, in relation to an appeal under—

(i) paragraph (a), (h) or (i) of that subsection, that the disposal was unduly lenient;

(ii) paragraph (b) [(c) (ca), (cb) [(cc), (cd) or (ce)] or (cd)] of that subsection, that the decision not to make the order in question was inappropriate;

(iii) paragraph [(cd) or] (dd)] of that subsection, that the making of the order concerned was unduly lenient or was on unduly lenient terms;

(iv) under paragraph (f) of that subsection, that the decision to remit was inappropriate;

(v) under paragraph (g) of that subsection, that the deferment of sentence was inappropriate or was on unduly lenient conditions."

[23] In her report to this Court commenting on the appeal the sentencing judge expressed a concern as to the competency of an appeal against a decision not to impose an extended sentence. That concern arose from the terms in which the Lord Advocate's right of appeal is framed in section 108 of the 1995 Act. The disposals which the Lord Advocate may appeal are the subject of a comprehensive list, as enumerated in the paragraphs of subsection (1). The list begins with: "(a) a sentence passed on conviction", but there then follow nine paragraphs ((b) to (ce)) which are framed as a decision not to make an order of a particular sort. For example, paragraph (b) is "a decision under section 209(1)(b) of this Act not to make a supervised release order". There is no "decision …not to make" provision in relation to an extended sentence under section 210A of the 1995 Act but nothing arises from that for, as the sentencing judge correctly observes, an extended sentence is a sentence of imprisonment (and therefore "a sentence passed on conviction" in terms of paragraph (a)), albeit one which is the aggregate of a term of imprisonment ("the custodial term") and a further period ("the extension period") for which the offender will be subject to licence: section 210A(2) of the 1995 Act; *DS* v *HM Advocate* 2017 SCCR 129 at para [23]. Where the sentencing judge discerned a difficulty was the provision in section 108(2)(b)(i) which provides that an appeal may be made where it appears to the Lord Advocate that the disposal was unduly lenient. This was to be contrasted with section 108(2)(b)(ii), the equivalent provision to section 108(2)(b)(i) in relation to, for example, a decision not to make

a supervised release order. Section 108(2)(b)(ii) provided that an appeal may be made against a decision not to make a supervised release order where it appears to the Lord Advocate that the decision not to make the order was inappropriate. That, so the sentencing judge considered, fitted. Appropriateness was a proper criterion for review of a decision not to impose a supervised release order given that its purpose was to protect the public from serious harm. Undue leniency, on the other hand, was not so obviously a proper criterion; it was difficult to see how a decision not to impose an extended sentence involved considerations of undue leniency to the accused. As with a supervised release order, an extended sentence can only be imposed if it is necessary for the protection of the public from serious harm from the offender. Where an extended sentence is not imposed that will not be because the sentencer has exercised leniency, it will be because he or she has not considered it to be necessary.

[24] We do not share the sentencing judge's concerns over the competency of an appeal at the instance of the Lord Advocate which is based in whole or part on the proposition that the failure of the sentencing judge to impose an extended sentence resulted in a disposal which was unduly lenient. We note that in *HM Advocate* v *JT* the Court did just what the sentencing judge suggested might be incompetent; in a Crown appeal on the ground of undue leniency against a sentence which was not an extended sentence the appeal was allowed and the original sentence quashed with an extended sentence being substituted in its place.

[25] As already observed, an extended sentence is a single disposal which, through an aggregation of the custodial term and the extension period, is intended to meet all relevant sentencing objectives. Among these objectives is the protection of the public from serious harm. A custodial sentence which is not an extended sentence is also intended to meet all

relevant sentencing objectives, including protection of the public. Where such a sentence is appealed by the Crown, the argument may be that insufficient weight has been given by the sentencer to the objective of protection of the public. As a matter of the ordinary use of language that can be regarded as an argument that the sentence was "unduly lenient" in that it gave too much weight to factors pointing to a lesser sentence and too little weight to factors pointing to a greater sentence (irrespective of what the respective relevant factors might be). More simply, section 108(1)(a) of the 1995 Act allows the Lord Advocate to appeal any sentence passed on conviction. In deciding whether to make such an appeal, the Lord Advocate, and in deciding whether to grant such an appeal, this Court, must consider that the disposal was unduly lenient: section 108(2)(b). What that means is explained in *HM Advocate* v *Bell*: the sentence 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. Once that test is met and the original disposal is quashed the question of what would be an appropriate alternative disposal is at large for the Court. As Lord Carloway, then Lord Justice Clerk, explained in *Murray* v *HM Advocate* 2013 SCCR 88 at para [32]:

> "[W]hen the court is considering an appeal by a convicted person against sentence, it is looking to see whether a miscarriage of justice has occurred by reason of that sentence being excessive, inappropriate or unduly lenient, as the case may be. This exercise does not involve simply correcting any flawed part of the sentencing exercise carried out by the court of first instance and adjusting the sentence imposed according only to that correction. The court requires to look at the entire process in order to decide whether the sentence ultimately imposed is sustainable"

Sentences imposed in other cases

[26] With a view to supporting her submission that the sentencing judge's selection of five years' imprisonment did not fall outside the range of sentences which a judge at first instance, applying his or her mind to all the relevant factors, could reasonably have

considered appropriate, Ms Ogg invited the Court to look at the disposals which had been determined upon by the Appeal Court in five cases which the Crown had included in its list of authorities. We accept the potential utility of such an exercise. An objective in sentencing is consistency, in other words dealing with similar cases in a similar fashion with a view to achieving comparative justice. Equally, what is the appropriate range of sentences in a particular case will be informed by what has been done by sentencers in similar cases on previous occasions. Regard must therefore be had to precedent, at least where it enunciates a relevant principle or demonstrates a consensus in decision-making in relation to a particular pattern of facts: see eg *Scottish Power Generation* v *HM Advocate* 2016 SCCR 569 at para 38; *HM Advocate* v *Collins* 2017 JC 99, 2017 SCCR 31 at para 30. It is however to be borne in mind that the process of sentencing is case-sensitive and the facts in one case will seldom exactly conform to the facts in another case.

[27] The first of the cases to which Ms Ogg drew attention was *HM Advocate* v *Hamilton*. There a sentence of six years' imprisonment with a three year extension period imposed in terms of section 210A of the 1995 Act was quashed and replaced with a sentence of 10 years with a three year extension period where the accused had pleaded guilty to rape and the forcing of a complainer to submit to oral intercourse. The complainer was aged 42 but had the mental development of an eight year old child and had been subjected to a prolonged, violent and degrading ordeal.

[28] The respondent in *HM Advocate* v *JT* pleaded guilty to using lewd practices against a girl aged between six and ten by handling and photographing her private parts while she was asleep, and against his niece by using similar practices and also placing his private member against her private parts and of once raping his niece, both when she was aged between 13 months and five years. The rape involved only penetration of the labia majora

to the extent of one centimetre and was unlikely to have caused any pain or injury and could have happened without the complainer waking up. These incidents occurred while the complainers were sleeping in the respondent's house. The respondent admitted to a psychologist that he had photographed himself "attempting to insert his penis into his niece while she was asleep". He also pleaded guilty to being in possession of a number of indecent photographs of children which had been downloaded on to his computer, contrary to s 52A of the Civic Government (Scotland) Act 1982. The offences occurred over a period of four years. Following the commencement of police enquiries the respondent had displayed remorse and had assisted the police. The advice available to the sentencing judge was that the respondent was at a low risk of reoffending, and that that risk could be reduced by his participation in group work to increase his level of insight, and by supervision and monitoring on his release. The sentencing judge imposed a *cumulo* sentence of five years on the common law charges and a concurrent sentence of three months on the statutory charge. The sentence reflected a discount of two years in respect of the pleas of guilty. On an appeal on the ground of undue leniency directed against the sentence of five years, the Court quashed the sentence and substituted an extended sentence with a custodial term of eight years and an extension period of five years. The Court observed that had it not been for the respondent's plea of guilty and earlier conduct indicative of his acceptance of guilt and his cooperation with the police the appropriate custodial term would have been one of ten years. It further observed that the frequency with which a particular sexual offence has been committed will usually be an important consideration in the selection of an appropriate sentence, with respect both to punishment and to risk.

[29] The appellant in *Tough* v *HM Advocate*, who was 23 years of age and with a very low IQ, pleaded guilty to the sexual assault and rape of a 12 year old girl by penetrating her

mouth with his penis, penetrating her vagina with his finger and causing her to masturbate him; contrary to sections 18, 19 and 20 of the Sexual Offences (Scotland) Act 2009. The terms of the agreed narrative were that the complainer did not want any of these things to happen to her, but she did not inform the appellant of this. She said that she went along with what the appellant had wanted because of the amount of alcohol she had consumed. The appellant was given an extended sentence of six years and nine months, the custodial term being three years and nine months and the extension period three years. The custodial term was discounted from five years to reflect the appellant's guilty plea. The Court considered that starting point to be excessive given the relative maturities of the complainer and appellant. It quashed the original sentence and substituted an extended sentence of four years and three months, the custodial term being 27 months (discounted from three years in respect of the guilty plea) and the extension period two years.

[30] In *HMA* v *SSK* the respondent was indicted in respect of charges of sexual offences some of which preceded the commencement of the Sexual Offences (Scotland) Act 2009 and some of which came after that. He was found guilty of seven charges involving offences against two of his former partners and their children. The first (charge (001)) was one of using lewd practices on various occasions against a boy aged between nine and ten, in 2007 to 2008, including handling the boy's penis, attempting digital penetration of his anus, compelling the boy to masturbate him and oral penetration of the boy with his penis. The second (charge (002)) was of indecent assault, again on various occasions during the same time period, against the boy in the form of attempted sodomy. The third (charge (007)) was using lewd practices on various occasions against a girl aged between 12 and 14 in 2008 to 2010, including digital vaginal penetration, contrary to section 6 of the Criminal Law (Consolidation) (Scotland) Act 1995. In relation to the adult complainers, the fourth and fifth

(charges (013) and (015)) were libels of indecent assault against the first adult complainer in 2008 to 2010 in the form, first, of one incident of continued penile penetration of the anus after the withdrawal of consent and, secondly, of penile penetration of the anus on various occasions. The sixth (charge (018)) involved anal rape of the first adult complainer on various occasions from 2010 to 2013, contrary to section 1 of the Sexual Offences (Scotland) Act 2009. The seventh (charge (019)) was the anal rape of the second adult complainer, the respondent's wife, on one occasion in 2013, contrary to the same statutory provision. The trial judge imposed sentences which, in aggregate, ultimately amounted to an extended sentence of seven years, with a custodial element of five years' imprisonment. On a Crown appeal the Court quashed these sentences and substituted an extended sentence of 12 year with a custodial term of eight years. The opinion of the court was given by the Lord Justice Clerk (Carloway). At para [24] he said this in relation to what sentence was appropriate in relation to the offences against the children:

> "In relation to the conduct libelled in charges (1) and (2), this included the repeated oral penetration and attempted sodomy of a nine or ten year old boy over whom the respondent was in a position of trust;...
>
> The behaviour went on for a considerable period of time. This degree of sexual abuse committed against a child of this age is rightly regarded as particularly serious. ... Although the conduct in relation to the girl ... was more limited, it was still serious and significant, particularly when seen in light of the offending against the boy. The offences against the children can be seen as a course of conduct which could (but need not) have been disposed of by a cumulative penalty. In the modern era, even for an offender with no analogous previous convictions, a custodial sentence of at least four years would be appropriate for such lewd practices..."

[31] The respondent in *HM Advocate* v *AB* was convicted after trial of the oral rape of his cohabitee's 14 year old daughter. The offence took place in the family home and the sentencing judge accepted that the respondent had been in a position of trust. The rape was accompanied by threats that the respondent would hit the complainer if she refused to

perform oral sex on him. The trial judge imposed a sentence of three years' imprisonment. She took into account: the lack of analogous offending; the absence of "penile penetration or other activity that physically damaged the complainer's physical integrity"; and the violence being limited to a single threat. The Appeal Court allowed the appeal and substituted a sentence of five years' imprisonment. In delivering the Opinion of the Court, Lord Justice Clerk Carloway said this (at paras [11] and [12]):

> "The court recognises at once that Parliament has re-categorised penile penetration of the mouth as rape, it must sentence upon that basis. In this context it also recognises, as it may always have done, that an act of oral rape may be as abhorrent, demeaning and traumatising as vaginal rape. …
>
> It must always be a question of facts and circumstances whether an act of oral rape will attract a higher sentence than a vaginal rape or *vice versa*. The factors to be considered will include, in each case: the level of violence used; the relationship between the offender and the victim; the age or other vulnerability of the victim; the degree of psychological as well as physical harm caused; the age, previous convictions and character of the offender and any degree of remorse. There are, of course, many other variables."

The English Sexual Offences Definitive Guideline

[32] The advocate depute submitted that the sentencing judge's disposal could be seen to have been unduly lenient when cross-checked against the relevant *Definitive Guideline* formulated by the Sentencing Council for England and Wales.

[33] The *Definitive Guideline* sets out a series of steps which the Court must follow in arriving at its sentence. Step 1 is to determine the offence category by reference to harm and to culpability. Among the factors that may bring a case into category 2 for harm is the particular vulnerability of the child due to its extreme youth. That applies in the present case. For each harm category there are two culpability categories, A and B. Factors bringing a case into the more serious category A include abuse of trust, sexual images of the victim being recorded and the deliberate isolation of the victim; all of which apply in the present

case. The range of sentences indicated for category 2A is between 11 and 17 years' imprisonment with a starting point of 13 years' custody. Step 2 is to determine where a particular case lies in the category range by a consideration of aggravating and mitigating factors. We agree with the advocate depute that a number of the aggravating factors identified in the *Guideline* are present in the present case: specific targeting of a particularly vulnerable child, ejaculation, location of the offence (in that it occurred in the child's home), the presence of another child, and (according to the respondent) the commission of the offence whilst under the influence of alcohol or drugs. We further agree that beyond the lack of previous convictions there are no mitigating factors. Ms Ogg suggested that the respondent had showed remorse. That is not clear from the background reports. She also suggested that the respondent was of previous good character. Again, once it is appreciated that previous good character is different from having no previous convictions, as the *Definitive Guideline* explains, we have not seen evidence of good character. We accordingly would accept, as the advocate depute submitted, that the preponderance of aggravating factors would shift the sentence indicated by the *Definitive Guideline* upward from the starting point of 13 years towards 15. There are further steps but the only one of relevance in the present case is step 4, which requires the Court to take into account a guilty plea.

Recording offending and making an indecent image of a child

[34] What has been appealed is a *cumulo* sentence in respect of charges 002 and 003 on the indictment. Charge 003 was of taking or permitting to be taken or making indecent photographs of a child, contrary to section 52(1)(a) of the Civic Government (Scotland) Act 1982. This was done by the respondent making a video recording of his commission of the acts referred to in charge 002 using his mobile phone. The advocate depute submitted that,

as well as constituting a separate offence this constituted an additional significant aggravation of charge 002 to which the sentencing judge had paid insufficient regard.

[35] We see there to be considerable force in the advocate depute's submission. Such is the prevalence of use of mobile phones and such is the ease of making, retaining and transmitting (or "sharing") still and moving images using their associated technology that it has become increasingly common for perpetrators of sexual offences or their associates to record the commission of an offence, or to take photographs of the victim, on a mobile phone (see eg T O'Malley, *Sentencing Law and Practice* (3rd edn.), paragraph 7-12); also S Sandberg and T Ugelvik, "Why Do Offenders Tape Their Crimes? Crime and Punishment in the Age of the Selfie", 2017 *British Journal of Criminology*, Vol. 57, pp. 1023 – 1040). While so doing may have the result that perpetrators thereby document their offending and generate evidence which may incriminate them, as in the present case, the practice has what the Court of Appeal (Criminal Division) described in *Attorney General's Reference (Nos. 3, 73 and 75 of 2010)*, [2011] 2 Cr App R (S) 100 as "pernicious" effects. O'Malley notes that a victim's suffering is intensified by the knowledge that such a recording or image exists and that little can be done to control the use to which it may later be put or the extent to which it may be circulated and, as the Chief Justice (Judge) observed in *Attorney General's Reference (Nos. 3, 73 and 75 of 2010)*, retaining an image is:

> "a form of pressure to discourage any complaint … but also possibly for the purposes of blackmail … Anyone can understand what a powerful lever may be given to the criminal by his possession of photographs taken of the victim when, as in these cases, she has been subjected to degrading treatment."

The Chief Justice continued:

> "We make it clear that from now onwards the taking of photographs should always be treated as an aggravating feature of any case and in particular of any sexual case. Photography in these circumstances usually constitutes a very serious aggravating feature of the case" (paragraph [7](2)).

[36] We would adopt what was said in *Attorney General's Reference* about the recording of an image of sexual offending being an aggravation of the offence although in cases, such as the present, where a contravention of section 52(3)(b) of the Civic Government (Scotland) Act 1982 has also been libelled, it will be necessary, when determining upon an appropriate sentence, to avoid double counting.

Decision

[37] The respondent pleaded guilty to two very serious offences. Other than the fact that he had no previous convictions, there is little if anything by way of mitigation in the respondent's personal circumstances or his response to his offending as recorded in the background reports. Were the *Definitive Guidelines* from the Sentencing Council of England and Wales to be applied to the case the result would be a custodial sentence with a headline figure well in excess of the five years selected by the sentencing judge. Against that, while we did not find Ms Ogg's review of previous cases of direct assistance, given their different factual circumstances, overall these cases do suggest that, for whatever reason, the English regime as expressed in the *Definitive Guideline* produces a level of sentence which is higher than that which would be considered appropriate in Scotland in cases of this sort. Useful as the English guidelines have been found to be as a crosscheck or comparator, such instances of divergence in result will occur: see eg *Sutherland* v *HM Advocate* 2016 SCCR 41 at para [20].

[38] We therefore have not taken the figure which would be produced by an application of the *Definitive Guideline* as a benchmark for what would be the appropriate sentence in this case. However, the factors which in the *Definitive Guideline* bring an offence into category 2A: the extreme youth of the child, the abuse of trust, the recording of sexual images and the

isolation of the victim; and what are then listed as potentially aggravating factors: targeting of a particularly vulnerable child, ejaculation, location of the offence, presence of another child and commission of the offence whilst the offender was under the influence of drugs, are all considerations which require to be taken into account when assessing the relative seriousness of an offence committed in Scotland.

[39] Looking to the cumulative effect of these various factors we have concluded that the headline sentence selected by the sentencing judge was not only a lenient one but an unduly lenient one. In concluding that it was unduly lenient we have been particularly influenced by the fact that the respondent recorded a moving image of his rape of the complainer. That this was to be regarded as a material aggravation (and therefore a factor pointing to a higher sentence than would otherwise have been imposed simply for the rape) was enunciated in *Attorney General's Reference (Nos. 3, 73 and 75 of 2010)* and reiterated in the subsequently published *Definitive Guideline*. That is a position that we would endorse. We do not see it to be reflected in the sentencing judge's disposal.

[40] We shall quash the sentence imposed by the sentencing judge. We shall substitute a sentence of six years' imprisonment in respect of charge 002, that being based on a headline sentence of eight years discounted by the same percentage adopted by the sentencing judge. We have not seen it necessary to impose an extended sentence. We shall impose a separate sentence in respect of charge 003. We note that the maximum sentence for contravention of section 52(3)(b) of the 1982 Act on conviction on indictment is three years' imprisonment: section 52(3)(b) . The sentence will be one of 24 months' imprisonment, that being based on a headline sentence of 32 months, again discounted by the percentage adopted by the sentencing judge. As we have had regard to the appellant's videoing his offending as an aggravation of sentence in respect of charge 002, in order to avoid what would otherwise be

double counting, we shall order the sentence on charge 003 to be served concurrently with the sentence on charge 002. The sentences will be backdated to the date selected by the sentencing judge.