APPEAL COURT, HIGH COURT OF JUSTICIARY

[2018] HCJAC 12
HCA/2017/000487/XC

Lord Menzies
Lord Turnbull

OPINION OF THE COURT

delivered by LORD MENZIES

in

APPEAL AGAINST SENTENCE

by

VE

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: CM Mitchell; Paterson Bell Solicitors for Amer Anwar, Glasgow
Respondent: M Hughes, AD; Crown Agent

9 January 2018

[1] The appellant was found guilty after trial at the High Court of Justiciary at Glasgow on 23 June 2017 of two offences in terms of the Sexual Offences (Scotland) Act 2009. Charge 1 was a charge of repeated statutory rape of a girl aged 5 and 6 over an 18 month period contrary to section 18 of that Act. Charge 2 was a charge of a sexual assault by touching a girl aged 7 and 8 over the same period contrary to section 20 of that Act. The

complainers were sisters. The appellant who has lived in Scotland since 2012 was aged 14 at the date of the offences and 15 at the date of conviction. After preparation of background reports, on 2 August 2017 the appellant was sentenced to 6 years detention in respect of charge 1 and 1 year's detention in respect of charge 2, these sentences to be concurrent with one another. He now appeals to this court against sentence.

[2] It is accepted on behalf of the appellant that the offences were sufficiently serious that only a custodial sentence was appropriate, but it was argued on behalf of the appellant that a total of 6 years detention was excessive. There were two particular arguments advanced in support of this submission. First, that the judge erred in stating that the offences were carried out after a "level of planning had taken place in gaining the trust of the victims, isolating them within his home and perpetrating the offences while in a positon of trust". In reality, Ms Mitchell for the appellant argued, the appellant was a 14 year old boy whose sister was friendly with the two complainers who came to play in their house. There was nothing to support a suggestion of a significant degree of planning and this was not a situation akin to that of an adult engineering a situation in which he can be alone with children. Second, the trial judge failed to give adequate weight to the youth of the appellant and that the need for punishment and retribution was less in the case of a child offender than the need for rehabilitation. For these reasons Miss Mitchell submitted that the sentence of 6 years detention in respect of charge 1 was excessive and that this court should substitute a shorter period of detention.

[3] We consider that there is force in each of these submissions. With regard to the first we do not consider that it is fair to categorise the appellant's offending as displaying any real level of planning or gaining the trust of the complainers. They were friends of his sister and came round to his house to play. This was not engineered by the appellant. There is

nothing to support any suggestion of planning or premeditation. This is not akin to a situation in which an adult arranges matters so as to be alone with a child. Moreover the appellant was merely the oldest of a group of children – that was the extent of any position of trust which he held. We consider that the trial judge attached too much weight to issues of planning and trust.

[4] The considerations to be taken into account when sentencing a child were discussed by this court in *Adam McCormick* v *HM Advocate* [2016] SCCR 308 in which the *dicta* of Lady Hale in *R(Smith)* v *Secretary of State for the Home Department* [2005] UKHL 51, [2006] 1 AC 159 were adopted. In particular when sentencing a child regard must be had to the best interests of that child as a primary consideration, under reference to the United Nations Convention on the Rights of the Child, Article 3.1. In delivering the Opinion of the Court in *Adam McCormick* Lady Dorrian observed at paragraph [4]:

> "In selecting the sentence for a child, the court must have regard to the best interests of that child as a primary consideration. Moreover, a factor in that will be the desirability of the child's reintegration into society (Article 40). These points were again made in *Greig* v *HMA* [2012] SCCR 57, 32 JC 115:
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> > '[9] The problem which arises in this appeal is the identification of the correct principles to be employed in sentencing an adult offender for crimes committed when a child. The court accepts that, were the appellant to have been sentenced when he was still a child, any sentence for these crimes would have been significantly less than if the crimes had been committed by an adult. In sentencing a person who is a child, regard must be had to the best interests of that child as a primary consideration (see *Hibbard* v *HM Advocate* [2011] JC 149, under reference to the United Nations Convention on the Rights of the Child, Article 3.1). Regard must be had also to the desirability of the child's reintegration into society (Article 40).'"

Lady Dorrian went on to consider the *dicta* of Lady Hale in *R(Smith)* v *Secretary of State for the Home Department* and in particular paragraph [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. "

Lady Dorrian went on to observe at paragraph [6] in *McCormick*:

> "Other than to the extent that his youth made him less blameworthy than an adult, it is not clear that the trial judge had in mind any of these important factors – the welfare of the child offender, the need to facilitate rehabilitation and reintegration into society. It does not seem that she considered these factors at all, merely allowing a discount from an appropriate adult sentence to allow for immaturity. In that regard we consider that she erred."

[5] It does not appear to us that the trial judge in the present case has had adequate regard to these considerations. In this respect we consider that he too has erred.

[6] For these reasons we are satisfied that the sentence of 6 years detention in respect of charge 1 is excessive in the all the circumstances of this case. We shall allow the appeal, quash the sentence of 6 years detention in respect of charge 1 and substitute a sentence of 3 years and 9 months detention on that charge backdated to the same date as the original sentence. The sentence of 1 year's detention on charge 2 concurrent with that on charge 1 will remain unchanged.