APPEAL COURT, HIGH COURT OF JUSTICIARY

[2018] HCJAC 17
HCA/2017/000674/XC

Lady Paton
Lord Turnbull

OPINION OF THE COURT

delivered by LORD TURNBULL

in

APPEAL AGAINST SENTENCE

by

SEAN KELLY

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: C Findlater; John Pryde & Co (for the Glasgow Law Practice)
Respondent: D Small, AD, ad hoc; Crown Agent

6 February 2018

[1] The appellant Sean Kelly is now aged 50. On 28 September 2017, he pled guilty, in the Sheriff Court at Glasgow, to a charge of contravening sections 28 and 30 of the Sexual Offences (Scotland) Act 2009 by engaging in sexual activity with a boy, KM. The offences were committed between 1 January 2015 and 2 July 2015, when the victim was aged 14 years and the appellant aged 47. The conduct consisted of the victim penetrating the mouth and

anus of the appellant with his penis and the appellant penetrating the victim's mouth with his penis.

[2] After adjourning the diet for the preparation of a criminal justice social work report, the sheriff imposed an extended sentence of 28 months imprisonment with a custodial element of 19 months. The circumstances of the offending were that the appellant came to know the victim through frequenting a shop where the victim had a part-time job. They came to spend time together on a regular basis and each described themselves as being in a relationship. It was kept secretive though at the appellant's request.

[3] The circumstances made it plain that the appellant had engaged in grooming conduct and had invested a significant amount of thought and planning into his conduct. The victim was a vulnerable young boy whose parents were both dead and who was looked after by his older brother. The author of the criminal justice social work report noted that the appellant displayed evidence of minimisation and justification and did not take full responsibility for his conduct. He showed no insight into the damaging impact of his behaviour. He also noted that the appellant appeared to hold distorted views and attitudes about children's sexuality and more specifically about the victim. Having taken account of the whole circumstances, including the information provided in the report, the sheriff viewed the appellant's conduct as constituting a very serious offence.

[4] On the appellant's behalf, in oral submissions and in the written case and argument tendered in advance of the hearing, it was argued that a non-custodial sentence ought to have been imposed. Failing that, it was submitted that the custodial sentence selected was excessive and that in any event the sheriff ought not to have imposed an extended sentence. It was pointed out that the appellant appeared before the sheriff as a first offender. It was also explained that he had a full and productive history of working which had only ended

when he gave up full-time employment to care for his terminally ill mother. He is now receiving treatment for an anxiety disorder and depression and is suffering from fibromyalgia which causes generalised pain and requires him to use crutches due to poor mobility. It was submitted that the appellant's personal circumstances, his candid approach in discussion with the author of the social work report, and the low level of risk identified were all mitigatory factors which had not been given sufficient weight. When viewed alongside the protection afforded to the appellant by section 204(2) of the 1995 Act it could be said that the imposition of a custodial sentence was excessive.

[5] The sentence in the present case was imposed after the appellant's plea of guilty to one only of the charges which he faced was accepted. In the report which he prepared for this court the sentencing sheriff explains how he calculated the sentence which he had in mind to impose. In the first paragraph of his report he states:

> "The custody part of my sentence is 19 months with an extension period of 9 months. I arrived at the aggregate sentence of 28 months by reducing the headline sentence from 36 months to reflect the plea of guilty."

It appears to us that the sheriff has erred in his approach to the calculation of the appropriate sentence. He seems to have identified an overall headline sentence to which he has applied a discount and then allocated the resulting period into the custodial and the extension parts. Apart from anything else, the result is that the extension period selected for public protection has been discounted. That conclusion is reinforced by what the sheriff says in paragraph 9 of his report, where he informs us that the extension period would have been 12 months but for the discount which he afforded. In the case of *Jordan* v *HM Advocate* 2008 SCCR 618 at paragraph 12, the court explained that:

> "It is not appropriate to allow a discount from an extension period which is required for the purpose of protecting the public from serious harm from the offender: see the Opinion of the Court in *Du Plooy* v *HM Advocate* at paragraph [19]. Indeed where, as

> here, a court decides that an extended sentence is required, the length of the extension period should only be determined once the discounted custodial term has been determined"

The same view was expressed in *Gemmell and Others v HM Advocate* 2012 SCCR 176 by the Lord Justice Clerk (Gill) at paragraph [66], Lord Osborne at paragraph [130] and Lord Eassie at paragraph [142].

[6] Furthermore, we are not satisfied that the sheriff applied the correct test in determining that an extended sentence ought to be imposed. At paragraph 8 of his report he refers to the observations in the criminal justice social work report concerning the appellant holding distorted views and states:

> "In view of these remarks I considered that an extended sentence was appropriate and would allow post-release work and supervision which I considered would be in the public interest".

[7] Section 15 of the Management of Offenders etc. (Scotland) Act 2005 amended section 1 of the Prisoners and Criminal Proceedings (Scotland) Act 1993 with the effect that all short-term prisoners sentenced to a period of 6 months or more, who are as a consequence of conviction subject to the notification requirements of Part 2 of the Sexual Offences Act 2003, are entitled to be released on completion of one-half of their sentence but remain subject to licence in the community for the remainder of their whole sentence and can be recalled. The present appellant would therefore have been under supervision on release and subject to post-release work whether an extended sentence was imposed or not.

[8] Section 210A of the Criminal Procedure (Scotland) Act 1995 makes it plain that the only circumstances in which an extended sentence can be imposed are where the court:

> "considers that the period (if any) for which the offender would, apart from this section, be subject to a licence would not be adequate for the purpose of protecting the public from serious harm from the offender".

[9] The sheriff does not refer to the statutory test in his report and it will be noted that the test is not whether it is in the public interest that the offender be subject to a prolonged period of licence. The nature of an extended sentence was discussed in the case of *DS* v *HM Advocate* [2017] HCJAC 12 at paragraph 21 where the court said:

> "An extended sentence has a considerable penal effect, given the power to revoke the licence and recall the offender to prison (*cf Robertson* v *HM Advocate* 2004 JC 155 at para [30]). Its purpose is to allow the court to make provision for public protection where that is necessary while not imposing a custodial sentence, which from other perspectives, might be disproportionate. Accordingly, before it can impose an extended sentence, the court must have formed the view that when the offender comes to be released from the determinate sentence which it is minded to pass, he will still present a risk of serious harm to the public".

[10] The sheriff's report in the present case does not disclose that he applied his mind to the question in the manner explained in *DS* v *HM Advocate*. We are therefore satisfied that the sheriff misdirected himself in law in selecting an extended sentence and we shall quash the sentence imposed. The question of what the appropriate sentence should be now falls to this court to determine. The appellant is a first offender and has the benefit of section 204(2) of the 1995 Act. Nevertheless, we are satisfied that the offending to which he pled guilty was of such gravity that only a custodial sentence would be appropriate. His conduct reflected an abusive breach of trust by an intelligent and informed adult of a teenage boy and it had the hallmarks of grooming, thought and planning which were referred to earlier in this opinion.

[11] We have taken account of the risk assessment undertaken by the author of the criminal justice social work report and we note that he was assessed as being in the minimum risks category using the LS/CMI tool and at low risk for sexual offence reconviction using the Risk Matrix 2000 tool. We also note that in the two years which passed between the victim disclosing matters to the police and the appellant's trial diet he

was in no other trouble. As pointed out, he had a good and long record of employment. In all of these circumstances, in our opinion, the test for the imposition of an extended sentence is not met.

[12] Taking account of the whole circumstances, we shall impose a headline sentence of 30 months imprisonment which we will restrict in light of the guilty plea to a period of 20 months to date from 23 November 2017. The appellant will be subject to the notification requirements provided for by the Sexual Offences Act 2003 and the case will also be referred to the Scottish Ministers under section 7 of the Vulnerable Groups (Scotland) Act 2007.