APPEAL COURT, HIGH COURT OF JUSTICIARY

[2018] HCJAC 26
HCA/2017/000578/XC

Lord Menzies
Lord Turnbull

OPINION OF THE COURT

delivered by LORD MENZIES

in

APPEAL AGAINST SENTENCE

by

H.M.

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: A Ogg (sol adv); Paterson Bell Solicitors, Edinburgh for Kilcoyne & Co, Glasgow
Respondent: A Brown QC, AD; Crown Agent

17 April 2018

[1] The appellant was convicted after trial at the High Court of Justiciary at Glasgow of three serious charges. The first was of lewd, indecent and libidinous practices and behaviour towards his younger sister between May 1971 and May 1975 at a time when she was aged between four and about seven or almost eight; second, of rape of the same younger sister on one occasion between the same dates; and third, rape of a younger cousin

of his on various occasions between November 1973 and November 1976 when she was aged between three and six.

[2] The trial judge obtained a criminal justice social work report and having heard mitigation on behalf of the appellant on 5 September 2017 he sentenced the appellant to a cumulo sentence of nine years imprisonment from that date. The trial judge stated that if the charges had been sentenced individually the sentences would have been four years for the first charge and six years imprisonment for each of the second and third charges but that taken together this would have resulted in a total sentence of 16 years which he considered would be an excessive penalty. He therefore imposed a cumulo sentence of nine years imprisonment in respect of the three charges.

[3] The trial judge observed when passing sentence that the sexual abuse of children is abhorrent and that rape stands at the most serious end of the scale of sexual offences. He went on to say that anyone who commits such an offence must expect to receive a significant custodial penalty whenever they are brought to justice. We agree with those views. We agree that if these crimes had been sentenced individually, in many cases it would have been appropriate to impose sentences of four years, six years and six years. We also agree with the trial judge that a cumulative total of 16 years would have been an excessive penalty and that he was correct to impose a lower cumulo sentence.

[4] He states at paragraphs 3 and 4 of his sentencing remarks at page 8 of his report to this court:

> "3. I have listened to what has been said on your behalf and carefully read the Criminal Justice Social Work Report. I take into account that you are a first offender; that you have not otherwise come to the attention of the authorities; that you have a good work record, and that you have a supportive wife and children.

4. I also have regard to the fact that you were a teenager aged between 13 and 17 at the time you committed the crimes. You are now 59 and present a low risk of re-offending. You continue, however, to deny committing the crimes and suggest that you are the victim of a conspiracy."

What the trial judge did not do in the course of his sentencing statement, nor in his report to us, was to make any reference to the authoritative guidance provided by this court in the case of *Paul Greig* v *HM Advocate* 2013 JC 115 in which the court gave authoritative guidance as to how a court should approach sentencing an adult for an offence committed whilst a child, what weight should be given to the appellant's age at the time of the offence, the appellant's behaviour in the intervening period and also what weight should be given to the need for future protection of the public. These matters had already been covered by this court in the case of *L* v *HM Advocate* 2003 SCCR 120.

[5] In the present case, the criminal justice social work report adopted three methods of risk assessment to assess the risk presented by the appellant. These resulted in an assessment of a minimum risk in one of them and of low risk in each of the other two methods of assessment. It does not appear that the trial judge in reaching the cumulo sentence of nine years imprisonment has had sufficient regard to the period of over 40 years during which the appellant has not re-offended or come to the attention of the authorities and in which he appears to have led a pro-social life, being fully employed and forming part of the community in which he lived. The cases of *Greig* and *L* in which the original sentence in each case was reduced from eight years imprisonment to five years imprisonment can be distinguished from the appellant's circumstances in the present case because it does appear that the appellant continued to offend in relation to his young cousin in relation to the third of these offences when he was a rather older teenager until the age of 16 or 17 whereas for example in *Greig* the offences were committed when the appellant was aged 14 and 15.

[6] Having regard to all of the circumstances in this case, including the guidance given in *Greig*, the fact of the long intervening period of responsible adulthood and the assessment that there is a low need for the public protection, we consider that the cumulo sentence imposed by the trial judge was indeed excessive. We shall accordingly quash that sentence. However, we reiterate that these were abhorrent and serious crimes and that has to be reflected in the sentence of this court. We shall accordingly impose a cumulo sentence in respect of all three charges of six years imprisonment to date from the same date as the sentence imposed by the trial judge.