APPEAL COURT, HIGH COURT OF JUSTICIARY

[2018] HCJAC 36
HCA/2018/159/XC

Lord Justice General
Lord Menzies
Lord Turnbull

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in the Crown appeal against sentence by

HER MAJESTY'S ADVOCATE

Appellant

against

JOHN WILLIAM BARBOUR

Respondent

Appellant: A Prentice QC (sol adv) AD; the Crown Agent
Respondent: M Stewart QC; Faculty Services Ltd (for Lindsay & Kirk, Solicitors, Aberdeen)

13 June 2018

General

[1] On 7 February 2018, after a trial at the High Court in Edinburgh, the respondent was convicted of three charges and sentenced to 4 years imprisonment. The first charge was one of lewd, indecent and libidinous practices occurring in 1979, when the respondent was aged between 13 and 14 and the complainer was only 4 or 5. The libel was that on various occasions he, amongst other things, pulled the pants of the complainer down, digitally penetrated her vagina and caused her to masturbate him. The complainer had essentially

been intercepted by the respondent on frequent occasions when she was simply out on a Sunday morning to collect a newspaper. The second charge related to events in 1984 to 1986, and involved lewd, indecent and libidinous practices towards a second complainer, who was then aged about 5 to 7. The respondent was aged between 18 and 21. The behaviour included digital vaginal and anal penetration, causing the complainer to masturbate him and penile penetration of her mouth and anus. The third charge involved the same complainer and was that, on various occasions, the respondent raped the complainer to her injury. This behaviour occurred when the respondent was a lodger at the complainer's mother's house. On frequent occasions, he removed the complainer from her bed and took her through to the bedroom which he shared with her younger brother, who was then aged about 2, and perpetrated the acts libelled.

Personal circumstances

[2] The respondent continued to deny the offences at trial. His personal circumstances were that he had been married for some 25 years. He and his wife had brought up his wife's three children, who were now in their 20s and 30s, and a child of their own, now also in her 20s. The respondent had worked for some 30 years as a sales manager for Grampian Leisure, who were involved in the provision of arcade machines. He had no previous convictions.

[3] The Criminal Justice Social Work Report narrated that it was difficult to ascertain the likelihood of re-offending, given that the offences had been committed more than 30 years ago. It was thought that any risk could not be managed within the community. The report recommended that the respondent undertake "programmatic" work within a secure

environment before his risk of re-offending and threat to the community could be assessed. There was no reason to suggest that he was now a high risk to the public.

The trial judge's reasoning

[4] The trial judge took into account that, at the time of the first charge, the respondent had been a child and that over 30 years had elapsed since the last of the offences in the second and third charges. He sought to apply guidance from *Greig* v *HM Advocate* 2013 JC 115, to the effect that, although the respondent had to be sentenced as an adult offender, that sentence had to take into account his age, and hence relative immaturity, at the time of the offences. The fact that, during the period since the offences, the respondent had made a positive contribution to society was important. Protection of the public was not a material consideration, as it would have been had sentencing occurred shortly after the offending. The judge had regard to *E(V)* v *HM Advocate* 2018 SLT 246, in which the appellant had been aged 14 at the date of the offences and had been convicted of the rape of a girl aged between 5 and 6, over an 18 month period, and sexual assaults on another girl, aged 7 and 8, over the same period. The court quashed the sentence of 6 years detention on the rape charge and substituted one of 3 years and 9 months, with a concurrent sentence of 1 year remaining for the assaults.

Submissions

[5] The appellant maintained that 4 years was unduly lenient. Irrespective of the respondent's age at the time of the offences, and the passage of time since they had been committed, the abhorrent and seriousness nature of the crimes, committed against girls of such young age, required to be reflected in the sentence (see *M(H)* v *HM Advocate* [2018]

HCJAC 26 at paras [3] and [6]). The judge had given undue weight to the respondent's age at the time of the offences, the passage of time since the offences, the respondent's lack of offending, his full pro-social life since the offences and the decreased need for public protection.

[6] The respondent supported the reasoning of the trial judge, who, it was argued, was uniquely placed to assess the matter. He had considered the CJSWR. The Crown had attempted to deconstruct the offences and apply precedent to the constituent elements rather than looking at the totality of the offending. Although the sentence could be said to have been at the lower end of the available range, it was not unduly lenient.

Sentence

[7] The test to be applied by this court, before it can interfere with a sentence of a trial judge is, of course, not just that the sentence was lenient, but that it was unduly so in the sense that it fell below the range of sentences normally regarded as appropriate for offences of the relevant kind. The court is not satisfied that this test has been met. The trial judge had the advantage of considering the whole circumstances and seeing and hearing the witnesses, including, notably, the complainers. He was able to evaluate the victim impact statements. His report is a well-reasoned one, which justifies in some detail the approach which he took and the reasons for it. Although this sentence was at the lower end of the appropriate range, it was still within that range. The appeal is accordingly refused.