APPEAL COURT, HIGH COURT OF JUSTICIARY

[2024] HCJAC 22
HCA/2024/97/XC

Lord Justice General
Lord Matthews
Lord Boyd of Duncansby

OPINION OF THE COURT
delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in

NOTE OF APPEAL AGAINST SENTENCE

by

HIS MAJESTY'S ADVOCATE

Appellant

against

ALISTAIR DUNCAN FERGUSSON

Respondent

Appellant: Lord Advocate (Bain KC); Harvey AD; the Crown Agent
Respondent: Keegan KC; Faculty Services Ltd (for Whelan & Co, Aberdeen)

_____

28 May 2024

Introduction

[1] This Crown appeal concerns not only whether the sentences selected by the trial judge were unduly lenient. It also involves the nature of an extended sentence, notably how such a sentence should be expressed when a judge selects a series of concurrent and consecutive custodial terms.

The charges

[2] On 15 November 2023, at the High Court in Aberdeen, the respondent was convicted of 16 sexual offences against four different complainers; two of whom were his former partners and two were the daughters of one of those partners.

[3] Charges 1 to 4 libelled indecent assaults at common law and sexual assaults, under section 3 of the Sexual Offences (Scotland) Act 2009, on his partner, namely TA, in the years from 2006 to 2017. These involved seven offences which were committed, initially, when the complainer was asleep. In one of these the respondent had inserted a small vibrator into her vagina, and was attempting to retrieve it. On three occasions the complainer awoke to find the respondent licking her vagina. On another three occasions she was wakened by the respondent attempting to penetrate her mouth with his penis and thus attempting to rape her (2009 Act, s 1).

[4] The second group of charges (7 – 11 and 12 – 14) involved sexual offending against TA's daughter, NB, from the age of five until she left home at 16 (2000 – 2011). First, there were lewd, indecent and libidinous practices when the complainer was aged between five and 11, commencing with rubbing her vagina and escalating to attempting to penetrate her mouth with his penis and masturbating in her presence, all while she was in a bath. Secondly, when she was aged between eight and 16, the offending continued, when the complainer was in the shower. This involved the respondent masturbating, licking her vagina, photographing her, inserting a vibrator into her vagina and penetrating her mouth with his penis, all contrary to section 6 of the Criminal Law (Consolidation) (Scotland) Act 1995. He offered her money to do these things and to have intercourse with him. Charge 12 involved penile penetration of the complainer's mouth, but by this time, under section 1 of the Sexual Offences (Scotland) Act 2009, the offence had been redefined as rape. Charge 13

involved an assault and rape, by penile penetration, after which the respondent left the complainer £10. In charge 14, there was a sexual assault by touching the complainer's vagina, contrary to section 3 of the 2009 Act, when the complainer was 16.

[5] Thirdly, there were offences (charges 16 – 17) involving another daughter of his partner, namely SB, during the years 2006 to 2010, when the complainer was aged between 12 and 16. This consisted of lewd, indecent and libidinous practices, contrary to section 6 of the 1995 Act, by rubbing her vagina and, whilst she was asleep, rubbing his penis against her face.

[6] The final group of charges (19 and 21) covered sexual activity in 2018 and 2020, in respect of SS, a new partner. This complainer was aged between 16 and 18 and the appellant was 50. First, there were sexual assaults, contrary to sections 2 and 3 of the 2009 Act, by penetrating her vagina with a vibrator when she was asleep. Secondly, there were two contraventions of section 1 of the 2009 Act; that being rape by vaginal penetration.

Sentencing

[7] On 30 January 2024, at the High Court in Dundee, the judge imposed a number of different sentences. Ascertainment of just what sentences were selected by the judge, and what he had intended them to mean, has proved problematic. According to the transcription of the sentencing diet, he began by imposing 2 years imprisonment "*in cumulo*" on charges 1 to 4. That group included several attempted rapes. Secondly, on the common law offences against NB (charges 7 – 10) and the rape charges (12 and 13) he selected 8 years imprisonment, with a concurrent 1 year on the statutory lewd practices charge (11) which mirrored, for behaviour when she was over 12 years of age, that when NB was under that

age. At this point, the judge did not state whether the 8 year term was consecutive or concurrent with the 2 years.

[8] The judge imposed concurrent sentences of 1 year in respect of the two convictions involving SB under section 6 of the 1995 Act (charges 16 and 17); those to run concurrently with those involving NB (ie the 8 years). He then said that all of the sentences involving NB and SB were to run consecutively to those involving TA. The judge added a consecutive 4 year term for the fourth group of charges involving SS. Thus far a total of 14 years was imposed. The judge then said:

> "given the extended period of offending, I shall order an extension period of 4 years".

Just what that was intended to mean and to which sentence that period was to apply was not stated. The observant may have noticed that there was no sentence for the, albeit relatively minor, charge 14.

[9] In what may have been an effort to translate the sentence into something which was competent, the minutes recorded that what had been imposed was an extended sentence of 18 years. This was described as comprising a custodial term (*sic*) of two years (cc 1 – 4), 8 years (7 – 10, 12 and 13), 1 year (cc 11, 16 and 17) and 4 years (c 19 and 21) with the period (*sic*) imposed on charges 7 – 13 and 16 and 17 (possibly 8 years plus one year, but there is no mention of concurrency) running consecutively to the 2 years and the 4 years to run consecutively to the 8 years "and an extension period of 4 years". The warrant which followed attaches the extended element onto each sentence. It expressed the sentences on charges 1 to 4 as separate from each other but running concurrently. Those on charges 7 to 10, 12 and 13 are expressed as cumulative with each other as are those on charges 11, 16 and 17.

[10] On 31 January 2024, at the High Court in Dundee, in an attempt to cure the defect of failing to sentence on charge 14, a minute purported to impose on the respondent anew an extended sentence of 18 years, comprising a custodial term of 8 years and an extension of 4 years, the custodial term running concurrently with "that imposed on charges" 7 – 10, 12 and 13 (ie a separate 8 years). This simply does not add up. The warrant expresses this as an 8 year term on charge 14 alone with a 4 year extension on that charge.

The trial judge's reasoning

[11] The respondent was 63 at the time of sentencing. His previous convictions were not analogous and the judge disregarded them. The Criminal Justice Social Work Report recorded that the respondent continued to deny the offences. He had: demonstrated no insight into his behaviour; accepted no responsibility; and displayed no remorse. He blamed the complainers, who had been lying in order to secure compensation. He was at risk of re-offending and causing serious significant harm on release. The Stable and Acute (2007) Risk Assessment Tool placed him at high risk of offending and the Risk Matrix 2000 assessed him as at medium risk of re-conviction. The Tay Project Assessment Report was to a similar effect. The respondent did not intend to engage in sex offending programmes.

[12] The judge reports that he did not think that a single cumulative sentence was appropriate. Although the crimes were connected, there were significant differences, including the variations in the ages of the complainers, the periods over which they were abused and the type of abuse which they suffered. The judge was concerned that a single cumulative sentence would fail to make it clear that the respondent's offending against children deserved greater punishment than the other offences. The rape of SS merited

separate punishment, given the age disparity between the respondent and the complainer and the nature of the offence.

[13] The judge had specific regard to *Laird* v *HM Advocate* 2015 SCCR 434 and *S* v *HM Advocate* [1999] GWD 40-1930). Based on these cases, he reports that he selected a total of 14 years custody for all of the offending and that an extension period was appropriate. From the custodial cumulative base, the judge went on to select custodial periods for each of three groups of charges: (cc 1-4 – 2 years; cc 7-14, 16 and 17 – 8 years; cc 19-21 – 4 years) before adding 1 year for charges 11, 16 and 17). The judge explains that this intention had been to order "an extension period of 4 years to be added to" the 4 year sentence on charges 19 and 21. That is not reflected either in what the judge said at the sentencing diet or in the relative Minutes. He added, in his report to this court but not at the sentencing diet, that, on the first group of charges (1 – 4), had they stood alone, he would have imposed 5 years imprisonment. On the second group (7 – 11, 12 – 14), he would have imposed 12 years, had they stood alone. On the third (actually fourth) group (19 and 21), he would have imposed 6 years, had they stood alone.

Submissions

[14] In a detailed written submission, which was supplemented by oral argument, the Lord Advocate maintained that the sentences selected were unduly lenient; they fell outwith the range of sentences which could reasonably have been considered appropriate (*HM Advocate* v *Bell* 1995 SCCR 244 at 250-251). The judge had failed to have proper regard to the Scottish Sentencing Council's *Principles and purposes of sentencing*, notably protection of the public, punishment and the expression of disapproval. He ought to have: assessed the seriousness of the offences, with reference to culpability and harm; selected the sentencing

range; identified the aggravating and mitigating factors; and determined the headline sentence.

[15] On the first group of charges, were the Sentencing Guidelines to have been applied, 6 years would have been appropriate. The respondent had demonstrated an utter lack of regard for the complainer's sexual autonomy and betrayed her trust. Having regard to the England and Wales Sentencing Council guideline *Rape*, which could be used as a cross check (*HM Advocate* v *AB* 2016 SCCR 47 at para [13]), the range was between 4 and 7 years, with a starting point of 5 years.

[16] On the second group, the complainer had had behavioural problems at school and entered into abusive relationships as an adult. Her children had been removed from her care. She now suffered from multiple sclerosis. The appellant's conduct was worse than that in: *HM Advocate* v *CB* 2023 JC 59 (4 years); *HM Advocate* v *CH* 2017 SCCR 587 (8 years); and *HM Advocate* v *AB* 2016 SCCR 47 (5 years). The Sentencing Council for England & Wales' *Rape of a child under 13*, suggested a range of eight to 13 years, albeit for a completed crime. Ten years would have been appropriate for charges 12 and 13, and 12 years overall for this group.

[17] On the third group, *HM Advocate* v *CB* 2023 JC 59 offered some guidance, as could the cross check afforded by England and Wales Sentencing Council's *Sexual activity with a child family member*. Four years would have been appropriate. Finally, the fourth group, involving the rape of another, very much younger, partner ought, on the English guideline *Rape*, to have attracted a sentence of 5 years.

[18] The judge's imposition of an extended sentence was incompetent, if it was intended that there be an extension attached to a number of separate determinate sentences (*DS* v *HM Advocate* 2017 SCCR 129 at 130). It was not clear whether this is what the judge intended, or

whether it was only in respect of the two charges (19 and 21) relating to one complainer. Any extended sentence ought to have applied to all of the sentences.

[19] When imposing cumulative sentences, the judge ought to have stipulated at the sentencing diet what sentences he would have imposed otherwise (*McDade* v *HM Advocate* 1997 SCCR 52 at 54). He seemed to have selected 14 years as the appropriate overall custodial sentence and then added an extension period. He was entitled to impose consecutive sentences for groups of charges (*HM Advocate* v *RM* 2024 JC 81 at para [33]), but this led to several difficulties. Each group sentence, not just the aggregate, would have to be scrutinised, to determine the degree of leniency. By imposing consecutive sentences, the judge was forced to select derisory periods in order to fit his overall vision. The confusion in the Minutes would have to be corrected for the sentence to be correctly understood.

[20] A single cumulative sentence, which reflected the scale of the criminality, ought to have been imposed (*R* v *Wilding* [2019] 2 Cr App R (S) 37 at para 15, endorsed in *HM Advocate* v *RM* at paras [46] and [47]; *McDade* v *HM Advocate* at para 54). This was so even if the maximum on an individual sentence was exceeded (*Wann* v *MacMillan* 1957 JC 20; *Maguiness* v *MacDonald* 1953 JC 31). An extended sentence ought to have been imposed notwithstanding the statutory maxima (10 years) on charges 11, 16 and 17 (*Miller* v *HM Advocate* 2014 SCCR 147, *McCluskey* v *HM Advocate* 2013 JC 107 at para [17], *Mitchell* v *HM Advocate* 2024 SCCR 131 at para [79]).

[21] The respondent accepted that the way in which the judge had divided the offences into groups, upon which he imposed separate sentences, created problems and a perception that he had failed to recognise the serious nature of the offending on some charges. The practical effect of the sentence was nevertheless within the range of reasonableness and hence not unduly lenient.

Decision

[22] It is axiomatic that a judge's pronouncement of a sentence should be clear and unambiguous. It must be readily understood by the convicted person and all those present in court. If the sentence is in respect of multiple offences involving different complainers, the judge may have an option of selecting consecutive sentence for each offence, or group of offences, or choosing a cumulative sentence for the entirety of the offending. Where there is more than one sentence, a decision, on whether it is to run consecutively or concurrently with other charges, must be made. Whatever method is deemed appropriate, the "reasons … must be stated as clearly and openly as circumstances permit" (Scottish Sentencing Council: *Principles and purposes of sentencing* p 3).

[23] Where offences are unconnected, it will often be appropriate to sentence each offence, or group of offences, separately; thus making clear what was appropriate for each offence or group. If this is done, a problem can arise when deciding whether to make the sentences consecutive or concurrent. That difficulty, and its solution, was identified in *McDade* v *HM Advocate* 1997 SCCR 52 in which Lord Sutherland, delivering the opinion of the court, said (at 54):

> "If [the sentences] were made to run concurrently, it would mean that one set of offences would in effect be committed for free. If, on the other hand, they are made to run consecutively, this can result in a total sentence being imposed which is excessive in the circumstances. There are therefore some cases where it may be appropriate to impose a cumulo sentence …".

[24] This approach, which was also identified in *HM Advocate* v *RM* 2024 JC 81 (LJC (Lady Dorrian), delivering the opinion of the court, at paras [46] and [47]) avoids the individual sentences being reduced to a derisory level in order to achieve a proportionate overall penalty.

[25] What ought to occur, if a cumulative sentence is selected, is that the judge should explain, at the time, what sentence would have been selected had the offence, or group of offences, stood alone and why a cumulative sentence of a lesser amount than the sum of the various sentences had been selected. In this case, the sentencing judge failed to have regard to what was said in *McDade* and *RM* and, at least in respect of the first and fourth group of charges, selected periods of custody (2 and 4 years) which could, if looked at on their own, readily be seen as unduly lenient for, respectively, repeated attempted and completed rapes. The trial judge must have recognised this when, in his report, he stated that, had these groups stood alone, he would have imposed 5 and 6 years respectively.

[26] The method adopted by the judge in imposing an extended sentence was also flawed. As section 210A(2) of the Criminal Procedure (Scotland) Act 1995 states, an extended sentence is a sentence of imprisonment which is the aggregate of the term which the court would have passed, but for the statutory provision, and an extension period thereafter, during which the offender is to be on licence because, in terms of section 210A(1), of the need for added public protection. As was explained in *DS* v *HM Advocate* 2017 SCCR 129 (Lord Brodie, delivering the opinion of the court, at para [23]):

> "An extended sentence … is not a sentence which is added on to a custodial sentence, nor is it an additional period of time … tagged on to the end of the custodial sentence …".

[27] The custodial element is the aggregate determinate period which would otherwise have been selected. The extension period may be imposed as a cumulative sentence in respect of a number of charges but it is added to "a" determinate sentence (*ibid*). Lord Brodie continued:

> "the section does not envisage the imposition of a number of separate determinate sentences of imprisonment which are then added together to make up the custodial term … to which an extension period is then attached."

[28] That is precisely what the trial judge eventually purported to do. At first, the judge did not even say what custodial term was being extended. The Minutes for the sentencing diet reflect that, but do say that the extended sentence is 18 years with the aggregate custodial term totalling 14 years. The Minute for 31 January 2024 records the extension as relating to an 8 year term which, if it was the term relative to charges 7 to 10 and 12 to 13, is to run before the consecutive 4 years on charges 19 and 21.

[29] If the judge were to impose a competent extended sentence, he ought to have imposed the extended sentence in the form of a cumulative custodial term which took account of the totality of the offending and included the extension period. Although charges 11, 16 and 17 carried a maximum sentence of 10 years, it is quite competent in solemn proceedings to impose a cumulative sentence in excess of the maximum provided that it is explained that had the particular offence been sentenced separately, a penalty within the maximum permitted would have been selected. This is what is frequently done with Orders for Lifelong Restriction (*McCluskey* v *HM Advocate* 2103 JC 107; *Mitchell* v *HM Advocate* 2024 SCCR 131). In an era in which the court is regularly faced with having to select a sentence for multiple offences but in the context of a course of conduct, often over many years, the choice of a cumulative extended sentence will often be the only practical option which is both fair and proportionate.

[30] Drawing all of these considerations together, it can readily be concluded that the trial judge made a number of errors in his sentencing reasoning. He should have proceeded to determine, as the Scottish Sentencing Council's *The Sentencing process* recommends: the seriousness of the offending overall, including the harm caused; selected the appropriate range; identified mitigating and aggravating factors; and determined the sentence. As

already explained, it will usually be appropriate, where the offending involves prolonged sexual offending on different complainers, to select a cumulative sentence to reflect the gravity of the offending, including an extension period if the statutory criteria were met. Where a cumulative sentence is selected, its component parts need to be explained by reference to what would have been imposed, on the charge or group of charges if they had stood alone.

[31] At the heart of this appeal is the contention that the sentence is unduly lenient. The court is conscious of the errors made, but it also appreciates that the trial judge heard the evidence led and ought to have been in a much better position to assess the gravity of the offending than this court. If this court were to ask itself the question of whether an extended sentence of 18 years, with a custodial part of 14 years, was unduly lenient, it would have to answer that in the negative. Alternatively, if the court were to quash the sentence because of the errors, and substitute its own sentence, it would reach the same overall result as the trial judge.

[32] The extended sentence of 18 years (14 custodial) will remain. The component parts, had the court been considering them separately, ought to have attracted 4 years cumulative on charges 1 to 4; 10 years cumulative on charges 7 to 10 and 12 to 14; 1 year cumulative on charges 11, 16 and 17; and 6 years cumulative on charges 19 and 21. Had these been made to run consecutive to each other, the result would have been an excessive custodial term of 21 years. It is thus reduced by one third in order to reach a fair and proportionate sentence overall.