**APPEAL COURT, HIGH COURT OF JUSTICIARY**

**[2021] HCJAC 43**
**HCA/2021/000113/XC**

Lord Justice Clerk
Lord Pentland
Lord Matthews

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in

Appeal against Sentence

by

AB

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

**Appellant: M Anderson; Michael Horsman & Co, Aberdeen**
**Respondent: R Goddard, QC, AD; Crown Agent**

8 October 2021

**Introduction**

[1] On 19 November 2019, at the High Court in Edinburgh, the appellant was convicted of 11 charges which included serious common law assaults, abduction, threatening and abusive behaviour, and stalking. The assaults were aggravated in that they involved abuse of the appellant's partner or ex-partner. The majority of the offences were perpetrated

against two such individuals, complainers SLG and SLD, repeatedly and over periods from 2012 to 2015 (SLG) and 2017 to 2019 (SLD).

[2] The sentencing judge was satisfied that the statutory risk criteria were met and on 30 March 2021 made an Order for Lifelong Restriction in respect of charges 2, 3, 5, 7, 9 and 11. The appellant challenges that decision.

**Factual context of the charges**

***SLG***

[3] The appellant entered into a relationship with SLG in 2012, when he was aged 15 and she was 17. In her evidence, she described various instances of violence, control and abuse perpetrated by the appellant. He called her derogatory names. He did not like her being in the presence of others and would turn up at her work unannounced. About six months into the relationship he became physically violent on a frequent, if not daily, basis. She was punched, kicked and pushed into walls. On one occasion, her head was hit off a shower and on another, the appellant head-butted her. He put her head through a pane of glass. He would lock her inside her flat. He smashed her mobile phone. The psychological impact of the appellant's actions was significant. Charge two related to repeated assaults over a period of time, including punching and kicking to the head and body and stubbing lit cigarettes on her face, all to her severe injury, permanent disfigurement and the danger of her life.

***SLD***

[4] The appellant and SLD became romantically involved in 2017, when he was 20. She was employed as a social work assistant with Aberdeen City Council dealing with young

people in care and they met when she was the appellant's care worker from January 2016. She lost her job as a result of failing to maintain appropriate professional boundaries.

[5] The appellant was verbally abusive. He criticised her appearance and weight and implied she was involved with others. He made threats to cause her physical harm and to expose her to her professional body for entering into a relationship with him. If she tried to leave, he held her down and on occasion, spat on her. He repeatedly assaulted her. Charge 9 involving repeated assaults, to her injury and danger of life. He kicked her on the body, bit her, choked her and punched her on the face. Once, when he thought that she was hiding something from him on her phone, he applied pressure to her body and neck. At times the appellant would hide the keys to the flat. She was unable to escape and had considered jumping out of the window. On one occasion, she was locked in for between 1 and 2 days. She was only able to free herself by contacting an ex-partner, who informed the police. The appellant had also prevented her from leaving a hotel. He sometimes turned up unannounced at her front door. He took photographs of her when she was asleep. He covered her mouth with his hand and she struggled to breathe. She phoned the police and the appellant said things in the background to pretend he was being hit by her. He threatened to use pictures and initiate disciplinary procedures with her professional body. He would head-butt the wall. He tried to persuade her to withdraw a statement made to the Crown. He continued to contact her from prison.

**Appellant's background**

[6] The appellant's childhood was a troubled one. He was placed on the Child Protection Register at birth in September 1996, being at risk of physical abuse from his

biological parents. After being cared for by grandparents, he was fostered prior to his third birthday and adopted shortly thereafter.

[7] Aged 6, he was referred to Child and Family Mental Health. He was thought to be displaying features associated with ADHD. This included aggressive behaviour, the onset of which coincided with the adoption of another baby boy. He began to display anger issues, and was violent towards family members. He pushed his younger brother down a long set of concrete steps. He stood on the boy's head in a swimming pool so that he almost drowned. His parents had to turn the electricity off at night to prevent him setting fire to things. He was excluded from school for aggressive and disruptive behaviour.

[8] In 2007 medical professionals became concerned at the risk posed by the appellant to his family. In December 2007 (at age 11) he was detained by police for assaulting his mother and younger brother, and was referred to the Children's Panel. In a visit to the family home social workers witnessed the appellant spit at his mother; threaten to put a metal fork in the toaster and urinate on his brother's bed. He brandished a knife at his mother on several occasions; had a fascination with fire-raising; attempted self-harm; was violent towards his brother and spoke about him in a graphically sexual manner. It was felt that there was a degree of premeditation in his behaviour.

[9] A psychiatric report in January 2008 revealed thoughts of harming his adoptive brother and animals. He talked about hiding behind doors with knives, murdering his mother and cutting the telephone wires to the landline. A full psychiatric assessment was recommended, and he was placed in care where his behaviour did not improve. He was charged with further breaches of the peace and assaults (including attacks on female members of staff), and again referred to the Children's Panel. He spent the remainder of his childhood in the care system.

[10] His problems have continued into adulthood. He now has 13 previous convictions, 9 of which are for assault with a domestic element, and one relates to an 18 month old child. He has a conviction for robbery. He has received sentences of up to 14 months imprisonment, has spent time in a young offenders' institution and been issued with CPOs (including assignments for unpaid work) and ROLOs. He has a history of substance abuse. His prison records narrate a total of eighteen discipline reports, half of which relate to violent incidents of physical or verbal assault.

**Procedural background**

[11] The presiding judge sought an RAR after reading the risk assessment contained in the CJSWR which he had ordered. After sundry procedure the court had (i) an RAR dated 12 March 2020 from Mrs Fiona Munro, Consultant Clinical Forensic Psychologist; (ii) an RAR from Ms Dawn Harris, Consultant Forensic and Clinical Psychologist, instructed for the appellant; and (iii) a supplementary report from Mrs Munro. A report from Louise Tansey, Consultant Forensic Clinical Psychologist, who did not see the appellant and who, it was accepted, "did not have the necessary skillset" to prepare an RAR need not be addressed. The court appointed a diet to hear evidence. Ms Harris and Mrs Munro both gave evidence. The nature of that evidence, so far as relevant to issues in the appeal, will appear from the discussion which follows below. There were detailed written submissions for the appellant. We need not repeat these; the gist will be apparent from what follows.

**Analysis and decision**

[12] The two experts agreed on certain issues, but differed as to the categorisation of the risk posed by the appellant, according to the RMA classification of risk. Mrs Munro considered the appellant to pose a high risk; Ms Harris considered that he posed a medium

risk. As to the underlying diagnosis or presentation there was a considerable degree of agreement. For example, they both diagnosed antisocial and borderline personality disorders, combined with narcissistic and psychopathic traits, all of which posed challenges for his management. In this respect, they differed significantly only in relation to the nature, extent and potential consequences of the psychopathic traits. They both agreed that his personality disorders were rooted in his disturbed and traumatic childhood. Both considered there was clear evidence that the nature, seriousness and pattern of the appellant's behaviours indicated a propensity seriously to endanger the lives and the physical or psychological well-being of the public at large. The identified characteristics were problematic, persistent and/or pervasive.

[13] In relation to the assessment and management of risk, where they differed was (i) on whether the appellant's pervasive characteristics could adequately be managed by measures short of lifelong restriction; and (ii) whether there were protective factors which could be prayed in aid in this respect. Mrs Munro thought there were no protective factors, other than that provided by incarceration. She expressed the view that a robust treatment and risk management plan effective in reducing the current risk of violence could not be designed. The appellant was currently not manageable in the community. Even if this was no longer the case following successful prison-based psychotherapeutic work, he would still require high levels of community monitoring for several years following liberation. She was not optimistic that he could be supported towards desistance even in the medium-long term. Ms Harris, on the other hand, considered that there were protective factors in place. On the issue of management of risk, she considered that it was clear that if released at present, his risk would be high and a risk of re-offending imminent. Nevertheless, there was sufficient evidence to indicate that risk could be reduced and contained over his lifetime. This would

require his engagement with the relevant interventions, and an extended sentence of sufficient duration to ensure the completion of the Caledonian Programme.

[14] The sentencing judge preferred the evidence of Mrs Munro, and, considering that evidence in the light of his judicial experience, he concluded that the risk criteria had been met. He thus imposed an OLR.

[15] It is not suggested that the sentencing judge approached the matter in the wrong way, wrongly stated the nature of the risk which the experts felt the appellant presented to members of the public, was unconscious of the need to assess the likelihood of serious endangerment by projecting forward to a time when the offender, but for an OLR, would be at liberty, or did not pay proper regard to the terms of section 210E. The argument is that he misdirected himself on the evidence before him, wrongly discounting elements of the evidence of Ms Harris in favour of the conclusion reached by Mrs Munro. There is little doubt that if the sentencing judge was entitled to prefer the evidence of Mrs Munro for the reasons he gave, then the conclusion that the risk criteria had been met was almost inescapable, and an OLR had to be made. We turn therefore to the question whether the approach of the sentencing judge was justified.

[16] The sentencing judge identified numerous reasons for preferring the evidence of Mrs Munro. We shall group them under two heads, (i) the general approach; and (ii) amenability to change. In doing so we focus on those areas where it was submitted that the sentencing judge had erred.

***The general approach***

[17] In his report, the sentencing judge states:

> "Mrs Munro had not only satisfactorily explained why but had also satisfied me that she was diligent, thorough and unbiased. Ms Harris was less impressive as a witness. She appeared evasive at times. I formed the view that her RAR was the

> product of a comparatively superficial investigation which appeared to rely significantly on the accounts given or opinions presented by the appellant. There was neglect to triangulate and check information and I did not accept that was necessarily because the information was not available to her."

[18] In our view this conclusion is justified on the evidence. Mrs Munro, for her first report, conducted 17 hours of interview with the appellant and consulted a vast array of other material relevant to the assessment of risk. She supplemented her examination of school, social work and prison records with interviews of individuals, who could speak to those records, conducting interviews with a wide range of individuals (16 in number). In particular she consulted the appellant's discipline record in prison, and spoke to prison officers and mental health workers, both for her initial report and her supplementary one. She spoke to staff at the school for children with challenging behaviour where the appellant had been a pupil. Ms Harris on the other hand conducted 12 hours of interview with the appellant, and interviewed 5 other individuals, focusing on the appellant's family and friends in doing so. Otherwise she was heavily dependent on written records, generally without confirming the detail with those who were able to speak to the records. She took no account – and seems to have made no inquiry as to – his behaviour when in custody. Notwithstanding accepted best practice to use multiple sources of information for each area being assessed, she relied excessively on self-reporting by the appellant without cross-checking with more objective sources.

[19] When the sentencing judge refers to her "defensiveness", this appears to relate to her unsatisfactory explanations for failing to take account of the appellant's behaviour in prison; her reasons for referring to intelligence only as a protective factor; her erroneous recording of (lower) scores in the psychopathy test (PCL-R); and her failure to take account of allegations which had not been established against the appellant. We will return to some of

these below, but it is clear to us that the sentencing judge was entitled to consider Ms Harris's evidence on these matters to be unsatisfactory.

***Amenability to change***

[20] Mrs Munro described the appellant as having presented with

> "a pattern of using threatening behaviour and physical violence towards a range of male and female victims across the age range, which represented "the public at large". His behaviour was of early onset, chronic, persistent and pervasive. His violent behaviour spanned from childhood and has escalated, becoming most serious towards female intimate partners."

Ms Harris suggested that the appellant's youth and expressed willingness to change gave the potential for maturity to address the main drivers for reoffending. She referred to research published by the Scottish Sentencing Council on how delayed cognitive development in young people suggested they had a greater capacity to change than older people, and that developmental rather than chronological age was an important factor in assessing this. Of course, as Ms Munro observed, (and as was noted in *Ferguson*, [2014] HCJAC 19, Lord Clarke, para 137) it is well established that most offenders will reach a peak of offending at age 16 and then rapidly reduce frequency of offending so that by mid-20s there are fewer incidents. However, she added this:

> "the court should be aware that 5% to 6% are likely to be Life Course Persistent (LCP) as opposed to Adolescent Limited (AL) offenders regardless of treatment processes and naturalisation processes. These groups … engage in qualitatively different forms of antisocial behaviour. AL offending in males develops in conjunction with the onset of puberty and likely results from a disjuncture between biological and social maturity; … on the other hand, LPC offenders display signs of antisocial behaviour earlier in childhood. … It has been established that the age of onset of antisocial behaviour problems is one of the best predictors of adult criminal careers. It is for this reason that I outlined in detail the onset of AB's early antisocial behaviours in my report. In contrast I consider that Ms Harris has given this only fleeting attention."

[21] We consider that Mrs Munro was right to suggest that Ms Harris paid insufficient attention to the early onset of troubling behaviour by the appellant, and the nature of that

behaviour. She seems to have attached little weight to this, notwithstanding that elsewhere in her report she acknowledges that such a degree of behaviour in a child is "exceptional". Allied to this is the failure of Ms Harris to take into account any of the unproven allegations made against the appellant. It is well understood that in a risk assessment of this kind it is necessary to consider the offences or their circumstances in their context to identify whether they form part of a pattern. It is for this reason that it is legitimate to take into account other allegations, even where they have not been established, to consider whether they throw any light on whether an individual's behaviour suggests a pattern of offending. Mrs Munro did this. In this case those allegations included rape of SLG; seizing her by the neck and compressing same to the extent of restricting her breathing; attempting to push another into the path of a moving vehicle; and possession of class A drugs. Ms Harris left these entirely out of account, suggesting, that apart from the rape allegation, for the omission of which in her consideration she could not account, she regarded the other material as being of little account. She acknowledged that RMA guidance was to include such allegations but she chose not to do so.

[22] Ms Harris's view that there were several protective factors in the appellant's case was a feature which led her to conclude that he had the capacity to be amenable to successful intervention to change his behaviour. The protective factors she considered to be present were intelligence; motivation to engage in treatment; a supportive network of family; and the presence of external controls in the form of an extended sentence of a length sufficient to allow participation in the Caledonian Programme.

[23] Intelligence is a factor which can cut two ways, since it enables an individual to anticipate the "right" answer he should give assessors. Considering that there was evidence of the appellant's manipulative nature, this is of significance in the present case. Ms Harris

indicates that she was aware of this, and took it into account. However, how she did so is far from clear. It does not seem to have involved thorough double checking of the appellant's assertions with objective sources.

[24] Any evidence for motivation substantially rests on the appellant's own statements to Ms Harris, and some limited, if overly optimistic expressions of hope by his mother, who stated that she believed he had calmed down considerably since childhood, and can be more considered in his approach. Ms Harris seems to have accepted this at face value. How it squares with current, or other more recent, offending is left unexplained. We note that domestic abuse work was commenced with the appellant in YOI Polmont, but terminated after 6 sessions as he was insincere and deflecting responsibility for his offending. His offending behaviour in custody included the use of an illegally acquired SIM card to make abusive and threatening calls to SLD. Mrs Munro considered that the appellant's anti-authoritarian attitudes to professionals are also likely to interfere with his ability to develop the kind of therapeutic rapport that is required for lasting behavioural change. The sentencing judge was entitled to conclude that this view was in accord with the evidence as a whole.

[25] The suggestion that the appellant has a supportive family network seems to be contradicted by other comments in Ms Harris's report. For example, on two occasions she notes that the appellant has a strained relationship with his parents. Elsewhere she notes that:

> "He said he speaks to his brother daily but is unclear what level of positive support this provides. … He maintains that he speaks with his mother and father on occasion, but not enough to suggest there is an overall positive framework in place".

[26] Mrs Munro noted that:

> “he has some support from his father but this is very much on his father’s terms as he remains working overseas frequently and has separated from his wife in 2013; he has a new partner in Venezuela; he is now working in Mexico”.

None of this seems consistent with a supportive family network.

[27] The final protective factor – the extended sentence- is only such, beyond the period of incarceration, if there can be a reasonable expectation that intervention undertaken as part of it might be successful. The foregoing analysis suggests that this is not so.

[28] Accordingly the sentencing judge was entitled to state that there was not a basis for thinking that the appellant would genuinely engage with the Caledonian Programme or other interventions. He was entitled to accept that the only existing protective factor arose from incarceration.

[29] A further element which is relevant to the determination of how far the risk presented could be managed relates to the appellant’s psychopathic traits. In assessing these, Ms Harris used only one instrument, PCL-R, and in some instances accepted that she had erred in under-rating the presence of traits whilst having sufficient information to justify a higher rating. She explained also that, although she identified the presence of 18 out of 20 possible psychopathic traits, she had reservations about the use of PCL-R, largely to do with the fact that a person may have psychopathic traits without meeting the criteria for psychopathy. This is of course true, and as we understand it, is particularly an issue with making longer term predications in young offenders. However, none of this explains the under-rating of traits. According to Mrs Munro, when compared with the Scottish prison population the appellant’s PCL-R score was in the top 5%, a highly abnormal score with serious implications for risk management.

[30] The dangers of conflating a fallible measure of psychopathy as found in the PCL-R test with the construct of psychopathy was recognised by Mrs Munro. It is recognised by

the RMA. which has recommended the Comprehensive Assessment of Psychopathic Personality (CAPP) as a useful instrument to assess how responsive a prisoner would be to treatment. Ms Harris did not use CAPP, but Mrs Munro did. Her findings confirmed the presence of strong psychopathic personality traits which presented great concern for the appellant's future risk management. In her opinion presence of such a broad spectrum of psychopathy traits makes the appellant unlikely to succeed in responding genuinely to psychological treatment approaches offered.

[31] Given that the nature, extent and ongoing consequences of the psychopathic traits was an issue upon which the experts were split, on the evidence we have narrated the sentencing judge was clearly entitled to prefer the evidence of Mrs. Munro. He was entitled to accept on the evidence that the appellant lacked remorse, was superficially charming, was manipulative, callous, lied pathologically, was criminally versatile, sexually promiscuous, had poor behavioural controls and a parasitic lifestyle with a history of early behavioural problems; he had a proneness to boredom and need for stimulation, lacked realistic long-term goals, had shallow affect, displayed irresponsibility, had revocations of conditional releases and failed to accept responsibility for his own behaviour; there was partial evidence that he was grandiose, he was impulsive and had a history of juvenile delinquency. He was entitled to conclude that the appellant presented an ongoing risk of causing serious harm by offending and that there were essentially no protective factors to manage that risk. He was entitled to find that the risk criteria had been met, and that being so, was obliged to impose an OLR.

*Other criticisms of the sentencing judge*

[32] A number of other points were advanced on the appellant's behalf, suggesting that the sentencing judge failed to give appropriate weight to certain aspects of the offences,

made errors in his original report for the risk assessor, or placed undue weight on the appellant's demeanour during his evidence. There is no merit in any of these complaints. Whether there were errors in the original report is beside the point: the assessor was not misled and her conclusions were unaffected by any such matter. It is clear that the sentencing judge, proceeded with great care in the exercise of his discretion, aware that the RAR was a tool for his assistance, fully alert to the guidance in *Ferguson*, thoroughly testing the evidence of the expert witnesses and subjecting it to proper judicial analysis.

[33] The written submissions contain an argument that the sentencing judge, who was of course the trial judge and who had heard all the evidence, erred in selecting 8 years as the appropriate period to mark retribution and deterrence, ignoring public protection. This was not specified further or supported by argument. In any event, the period selected was within the discretion available to him.

***Post script***

[34] There is one remaining matter to address. In the Note of Appeal there is repeated reference to the appellant not being an "exceptional offender", supported by a submission that an OLR is reserved for those coming within such a description, all under reference to comments by Lord Clarke in *Ferguson* para 137. Such a submission represents a misunderstanding of *Ferguson.* Of course, as in the case of the offender *Balfour* whose circumstances were addressed in *Ferguson* (see, for example, para 121), violence of an exceptional degree may be a relevant feature in assessing the risk presented by an offender, and may lead to a conclusion that the risk is such as can only be managed by lifelong restriction. The absence of any particularly egregious feature in the offending may lead to a conclusion that risk can be managed in another way. Much will depend on the particular circumstances of each case. However, the court in F*erguson* was not positing some sort of

text of exceptionality as a prerequisite for the imposition of an OLR. As the Lord Justice Clerk (Carloway) specifically noted at para 115, that is not the test. The sole basis for making an OLR is that the judge is satisfied that the risk criteria in section 210E have been met.