APPEAL COURT, HIGH COURT OF JUSTICIARY

[2025] HCJAC 3
HCA/2024/000523/XC

Lord Justice Clerk
Lord Doherty
Lord Beckett

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in

CROWN APPEAL AGAINST SENTENCE

in causa

HIS MAJESTY'S ADVOCATE

Appellant

against

LM

Respondent

Appellant: Harvey AD; the Crown Agent
Respondent: Stewart KC, Russell (sol adv); Craig Wood Solicitors Ltd

21 January 2025

Introduction

[1] On 30 August 2024 at Inverness High Court, the respondent was found guilty of a series of sexual offences. These were: (i) communicating indecently with LW, a young girl aged between 13 and 16, (charge 1); (ii) rape, sexual assault and sexual assault by

penetration of LW (charge 2); (iii) attempting to communicate indecently with a child, by communicating indecently with a person he believed to be a young girl aged between 13 and 16 named "Scarlet Speicher" (charge 3); and (iv) attempting to cause a child to view a sexual image, by causing "Scarlet Speicher" to do so (charge 4). The respondent was aged 50 to 52 at the time of the offending. The offences in charges 3 and 4 were both aggravated by being committed whilst he was on bail in respect of charges 1 and 2.

[2] The respondent was sentenced to (i) 18 months' imprisonment on charge 1; (ii) an extended sentence of 7 years on charge 2, consisting of a custodial term of 5 years and an extension period of 2 years; (iii) 12 months imprisonment on charge 3; and (iv) 18 months imprisonment on charge 4. The sentencing judge determined that these sentences were to be served concurrently. The Crown appeals against the sentence on the grounds of undue leniency, substantially on the basis that charge 2 merited a longer sentence than that imposed, and that by making the sentences on charges 1, 3 and 4 concurrent the judge failed to recognise the overall gravity of the offending. The individual components of the sentences in respect of charges 1, 3 and 4 were not challenged.

Facts

Charges 1 & 2

LW

[3] LW was a schoolgirl living at home with her parents at the time of the offending, during which she was between the ages of fourteen and fifteen. Her evidence was given by way of a pre-recorded joint investigative interview and by pre-recorded commission.

[4] LW played in a girl's football team in her spare time, and was clearly a skilful player. The respondent was the coach of the team. Between 2019 and 2022 he nominated her as

captain of the team. She would often assist with training sessions for younger teams on Sunday mornings. She won the club's "Player of the Year" prize. The respondent treated her more favourably than the other team members, by whom he was recognised as a strict and "shouty" coach. He singled her out for attention and asked her to demonstrate moves to the other members of the team. In or around 2019, when LW was 12 or 13, the respondent sent LW messages on Facebook Messenger. The content of the messages was relatively innocuous, but communicating with her in that way was inappropriate. LW thought he sent the messages because he was drunk and in the pub. Others became aware of these messages and the respondent was asked to stop messaging her.

[5] In or around January 2021, LW started to receive further messages from the respondent, initially via Snapchat, and later on Instagram. The messaging was "jokey" and initially related generally to the football team. However, it became more frequent, to the point of daily communications. It also became more personal and flirtatious, and sexual. He started asking questions about LW's personal life, and her sexual experience. He began to send photographs of himself. She, in turn, sent photographs of herself to him.

[6] The respondent began to meet LW in person, outside of football training, in or around late September 2021. On the first occasion, he gave LW a lift home from training. On the second or third occasion he drove her to a layby at a country road where he kissed her. Prior to the fourth occasion, he had spoken to LW about having sex with her and had purchased condoms. He picked her up at an agreed spot and drove to a different layby, which was "more tucked away." There, he placed LW into the back of his car and had sex with her. He did not use a condom.

[7] The respondent had sex with LW in this manner on around 8 - 10 occasions between October 2021 and February 2022. On each occasion he collected her from an agreed upon

meeting point (not home, and not the football ground) in his car at around 6:30 in the evening, drove her to a secluded or wooded area and had sex with her. On some of these occasions they performed oral sex on each other and the respondent often digitally penetrated LW's vagina. On some occasions the respondent ejaculated inside of LW's vagina or mouth. At no point did he use a condom. LW started wearing a contraceptive patch.

[8] Between October 2021 and February 2022, the respondent's messages intensified, becoming even more sexually explicit. LW responded in kind. The respondent sent photographs of his naked body, and of his erect penis. He encouraged LW to view pornography, and discussed performing anal sex. In reference to the date of her sixteenth birthday, he said he was "petrified I go to jail worn (sic) this ... But if I do it's been worth it." In another message he said "I know I go down if we get caught", and prior to one meeting he messaged "be careful you don't get seen".

[9] When LW was approached to join a better team, he encouraged her to refuse and to stay in the team he coached, telling her she was not good enough, and that she should stay in the team to have more time to develop. This led to a disagreement between them, as a consequence of which the respondent sent messages to LW telling her not to come to training, that she was not welcome, that if she wanted to go she should just do so, and similar sentiments. LW was very upset at these messages, sending messages such as "please don't do this" and saying how upset she was. When the disagreement was resolved she sent messages saying "I ... thought you were never going to speak to me again", "I thought I'd ruined it".

[10] The respondent continued to meet with LW and take her to secluded areas in his car for sex until February 2022 when LW's father discovered a pregnancy test in her bedroom, whereupon the matter was reported to the police.

[11] LW said that, when meeting with the respondent, she turned off the location services on her phone to prevent discovery of her whereabouts by her parents, having told them that she was studying with a friend. In her evidence on commission (aged 17) it was clear that, looking back, the complainer found it difficult to categorise her relationship with the respondent. She explained that she had not originally told the police everything that had happened because at that stage she was "still kind of protecting him". In her victim statement, also given at the age of 17, she explained that:

> "This crime has had a significant impact on my health and well being. My school work has been badly affected by this with periods where I have been really struggling to cope emotionally resulting in low levels of concentration, inability to sleep, low mood and anger. I have really struggled emotionally trying to put what happened to the back of my mind but this has been really difficult. My recovery from the emotional and psychological impact of this crime may take some time but I am determined to move forward with support from my family and friends. The crime has had a detrimental impact on my future job prospects, as coming out of school I am now behind in the qualifications I had hoped to achieve. I do not yet know what impact this crime will have on my future relationships as I was at a young age when this crime took place."

KL

[12] KL was a project manager for a programme for the prevention of child abuse which taught children how to keep themselves safe. The respondent contacted her in August 2021. He voiced an interest, in his capacity as football coach, in the online safety workshops offered by the project. He asked lots of questions about why and how people abuse children online, how children "fall for it" and what sort of tricks are used by perpetrators of online sexual abuse. They discussed how such people could build up a relationship with a child.

FS

[13] FS had previously been the child protection officer for the football team, a role designed to enable the girls to speak about any concerns they had, or to seek guidance about

anything worrying them. There was not meant to be any contact between players and coaches outwith training, whether in person or otherwise.

PB

[14] PB was another coach at the football team. He explained that the respondent became the child protection officer for the team at the start of 2022. He noticed that the respondent sometimes spoke to individual girls alone, when he seemed quite "touchy-feely". This included LW.

Charges 3 & 4

Tiger-Lily Scierri aka "Scarlett Speicher"

[15] Ms Scierri is a member of a group of, in popular parlance, "paedophile hunters", who pose as children on social media websites for the purposes of detecting and reporting adults who engage with children for sexual gratification. Although 38 years of age, she created a social media profile under the pseudonym "Scarlet 19", stating "Scarlet's" age as 19 in order to be allowed on the platform. On or around 20 August 2022 she received a message from the respondent reading "Hi, I am [L], 51 from Scotland. And you?" to which she replied "I'm Scarlet, 14 from Brighton." She sent an edited photograph of herself to the respondent, using artificial intelligence to make her appear much younger. The respondent asked "Scarlet" for her Whatsapp number.

[16] The respondent began messaging "Scarlet" on a regular basis over several months. The witness, posing as 14 year old "Scarlet," replied to his messages. Between August 2022 and October 2022 some 6,000 messages passed between them. The messages progressed from reasonably platonic, to flirtatious, then sexually explicit. The respondent sent

messages designed to gain "Scarlet's" trust, such as "remember, your secrets are safe with me, ... so no need to worry LOL." He began to ask "Scarlet" increasingly sexualised questions and to increase the sexual content of the messages. Some messages referred to "Scarlet's" young age, and clearly anticipated sexual contact between them, including sex, in respect of which he wrote "this is sex and if we get caught, I go to jail as you are 14." On or around 26 October 2022, he engaged in a "video chat" with "Scarlet". Showing her his penis, he masturbated on the video call. "Scarlet" told him that it felt a "little weird". In fact the witness had recorded the call and accelerated the matter up through her organisation.

No defence evidence

[17] There was no defence evidence.

The live issue in relation to charge 2

[18] It is very clear from the speeches for the Crown and the defence that the live issue for the jury in relation to charge 2 was whether LW had freely consented to the sexual activity. The Crown case was that on the evidence the jury should conclude that the respondent had groomed LW, and that the result of that had been that her apparent consent at the time of the sexual activity had not truly been free agreement. The defence case was, regardless of whether or not there had been grooming, LW had freely agreed to what took place. In his charge the judge focussed the issue of free agreement for the jury, and he reminded them of the respective positions of the Crown and the defence on that matter. They were directed that the basis upon which the Crown sought a conviction on charge 2 was that consent, whilst apparent, had not been freely given and that conviction on this charge hinged on the jury's acceptance of that proposition. If they rejected that proposition,

the result would be that it would be open to them to convict on specific statutory charges relating to sexual activity with a minor.

The Criminal Justice Social Work Report

[19] The CJSWR noted that the respondent admitted the offences and knew what he had done was wrong. He said his attraction to LW was "too much" for him not to act on. He did not think that LW would tell anyone about their relationship, and had it not been discovered the abuse would have continued. He spoke about a "relationship" with LW as though it was a mature and equal partnership. The social worker noted that the respondent had no concern for anyone but himself, that he did not care who he hurt or upset in the process and that he lacked responsibility and remorse for his behaviour. The reporter considered that he had targeted and groomed LW, knowing her age, and took advantage of her during a period of months. He had been in a position of trust as a coach and having worked with LW's father. He presented "a danger to young females in the community in person and on social media."

The Judge's Reports

[20] In his appeal report the trial judge stated (para 16):

> "I formed the distinct impression, both from his general demeanour throughout the trial and from the content of the communications shown to the court which he had sent to [LW] and to "Scarlet" that he was a lonely and self-pitying man whose attentions had been directed at (real or imaginary) older female children because he felt that they would represent a more receptive audience for his advances than would have been likely in the case of a mature woman, rather than because of any particular and specific sexual interest in children."

He referred to the victim statement as noting the distress caused to LW's family by the discovery, and her removal from school in consequence, but otherwise it "did not seek to

depart from the evidence which she gave previously and subsequently, that she at least had conceived everything that had happened to have been consensual."(para 17).

[21] The judge noted that the respondent was highly and solely culpable for what he had done, and that the offences were aggravated by the breach of trust involved. However, he also noted (para 19) that the evidence of LW in respect of her apparent consent was a signally distinguishing feature of the case, effectively setting it apart from other cases of rape:

> "There was, however, in this case a highly unusual feature in rape and sexual assault cases, in that [LW] had, on her own undisputed evidence, throughout the events in question considered herself to be consenting to what had occurred, had participated in its planning, execution and concealment just as much as [the respondent] had, and frankly stated that she had found that participation pleasurable. I did not regard these matters as specifically mitigatory in nature, …"

[22] The judge decided not to impose a *cumulo* sentence on all the charges, and to make the various sentences of imprisonment imposed concurrent. He did not consider this to minimise the effect of the sentences on charges other than charge 2, since the commission of these offences, in particular charges 3 and 4, had a significant impact in persuading him that the test for the imposition of an extended sentence was met in relation to the offending on charge 2.

[23] In a supplementary report the judge provided a summary of the evidence of PB, FS and KL, which had not been referred to in his appeal report as he did not consider their evidence to be of any particular materiality in the sentencing exercise. In relation to the evidence that LW subjectively considered herself to have been consenting, he commented (para 4) that:

> "The verdict of the jury did not negate that evidence, nor did the Crown invite the jury to refuse to accept her evidence on that (or any other) matter. ... Any suggestion that I ought for the purposes of the sentencing exercise to have discounted her clear and unchallenged evidence as to her subjective belief that she was agreeing to what

> occurred therefore amounts to a suggestion that I should have proceeded to treat her evidence at the trial in a thoroughly unjudicial manner.."

Furthermore, whilst the verdict indicated that the majority did not accept that her consent had been free, it

> "did not and could not explain what caused that majority to make that determination. A number of suggestions were made by the Crown as to why she might not have been freely consenting to what occurred, for example that she was accustomed simply to doing as she was told by authority figures, that she wanted to avoid provoking the ire of [M], or that her free will had been manipulated by one or other means deployed by him. It was equally possible that the jury considered, having heard at length from her in her recorded evidential sessions, that she simply lacked the requisite maturity to give true consent to what occurred ... . Any attempt to ascribe a rationale to the determination of the majority would be entirely speculative." (para 5).

The judge thought it would be futile to draw parallels for sentencing purposes between the chapters of evidence concerning charges 1 and 2 and those concerning charges 3 and 4, their circumstances being so radically different.

Submissions

The Crown

[24] The Crown submitted that the sentencing judge erred in two respects:

(i) The sentence imposed did not reflect the gravity of the offending in charge 2.

(ii) It did not reflect the overall gravity of the offending, including that charges 3 and 4 were committed whilst on bail from charges 1 and 2. The most appropriate means of achieving this would have been to impose a higher overall *cumulo* sentence, with an extension period (*HM Advocate* v *Fergusson* 2024 JC 376).

[25] The Advocate depute reminded the court that the conduct of an abuser may cause his victim not merely to acquiesce but also to perceive her own acquiescence as consent: *R* v *Taylor* [2022] EWCA Crim 1207 at para 30. It was plain that the jury had accepted that the respondent had groomed LW and had concluded that a consequence had been that there

was not in fact free agreement by LW to the sexual activity. That was the basis upon which the sentencing judge should have sentenced the respondent. He fell to be sentenced as any other offender who had been convicted of repeated rapes whilst in a position of trust. The correct headline sentence fell in the range of eight to ten years, per *Collins* v *HM Advocate* 2017 JC 99. Features and consequences of the respondent's grooming behaviour which were relevant when considering an appropriate sentence were (i) the significant age difference between the respondent and LW; (ii) the respondent's position of trust and authority; (iii) the evidence of the respondent's harsh and jealous nature as a coach; (iv) the favouritism exhibited towards LW by the respondent; (v) the respondent's disapproval when she did not do as he wished; (vi) the changes in the behaviour of LW, in that she became secretive and denied the conduct to begin with; (vii) that the respondent had sought out the complainer on social media and messaging platforms; (viii) that the respondent's contact progressed from infrequent and innocuous to being frequent and sexualised; (ix) that the respondent's contact with "Scarlet" followed the same pattern; and (x) the evidence of KL that the respondent contacted her and they met, ostensibly because he was keen to learn how children were groomed and how to spot the signs of online abuse.

[26] The judge had treated the complainer's purported consent and active participation as mitigatory, notwithstanding his assertion to the contrary within his report. He attached undue weight to LW's "subjective experience", and failed to recognise that the grooming by the respondent was an aggravating feature. Reference was made to *HM Advocate* v *CB* 2023 JC 59, *NP* v *HM Advocate* 2022 HCJAC 24, *HM Advocate* v *JB* 2021 JC 194 and *Collins* v *HM Advocate, supra.* Whilst the complainer may have indicated during the JII that she had consented to the conduct, the sentencing judge was wrong to say that she considered what had happened was an expression of her bodily and sexual autonomy, a statement for which

there was no evidential basis. Grooming may make the person groomed an unreliable guide to what is actually happening. Her participation and acquiescence at the time had to be viewed in context. Reference was made to *Attorney General's Reference (no 53 of 2013)* 2014 2 Cr App (S) 1 where the court observed (para 20):

> "The reduction of punishment on the basis that the person who needed protection encouraged the commission of an offence is …. simply wrong. ……. an underage person who encourages sexual relations with her needs more protection, not less."

The judge also misinterpreted the victim statement and failed to reflect that the contents thereof suggest that, with maturity, the complainer has come to recognise the serious and criminal nature of what really happened.

[27] There were aggravations present which would justify an increase from the eight-year starting point used in *Collins.* Those were (i) the sustained period of grooming; (ii) the significant level of planning; (iii) the number of rapes; (iv) the period over which the rapes took place; (v) the absence of any contraception; and (vi) the fact that the accused was in an elevated position of trust: he was not only a football coach at the club but the club's Child Protection Officer.

[28] The judge had fallen into two errors in respect of charges 3 and 4. First, his decision to impose an extended sentence should not have affected his decision on whether to make the sentences for charges 3 and 4 concurrent to the sentence for charge 2: *McGowan* v *HM Advocate* 2005 SCCR 497 at para 15. Second, because the sentences for charges 3 and 4 were concurrent with the sentence for charge 2, the offences were, in effect, committed "for free": *HM Advocate* v *Fergusson*, *supra* (citing *McDade* v *HM Advocate* 1997 SCCR 52). In all of the circumstances, the most appropriate disposal was a *cumulo* sentence, taking into account all of the offending and passing a sentence which marked that offending.

Respondent

[29] Senior counsel for the respondent accepted that grooming was the basis for the conviction, and that grooming constituted an aggravation of the offences. However, it did not follow that the court could assume that the jury had accepted each and every factor which the Crown had relied upon in respect of grooming. Grooming could cover a wide range of circumstances, and the extent to which it aggravated an offence could vary widely. There had been a breach of trust, but the respondent's contact with LW had been of a limited and transitory kind, which could be contrasted with the position, for example, of a parent or someone *in loco parentis*. It was also important to avoid double counting aggravations. The judge had heard all of the evidence and he had been in the best position to give appropriate weight to grooming, breach of trust, and all other relevant sentencing considerations. The respondent accordingly adopted the reasoning of the trial judge. The sentence fell within the range of sentences which the learned trial judge, applying his mind to all the relevant factors, could reasonably have considered to be appropriate.

[30] The respondent was originally charged with section 28 offences in respect of the circumstances of both charges 1 and 2, and negotiations took place with a view to a section 76 plea. When charges 3 and 4 were added, these discussions ended. However, at the preliminary hearing, a plea of guilty to charge 2 in the alternative of section 28 was tendered, along with pleas of guilty to charges 3 and 4 as libelled. Those pleas were rejected. Against that background, therefore, whilst the respondent was ultimately convicted of rape, his pleas of guilty and early acceptance of the Crown case against him as regarding his conduct in charges 1 ,2, 3 and 4 had clear utilitarian value and limited the nature and extent of cross-examination of Crown witnesses both at commission hearings and at trial. In terms of s 196 of the Criminal Procedure (Scotland) Act 1995, the trial judge was entitled to take the

conduct of the accused in accepting guilt for his criminal conduct and his early pleas of guilty and to apply a discount to the sentence which otherwise would have been imposed.

Analysis and decision

Grooming

[31] We begin with some general observations.

[32] As has been recognised elsewhere (*R* v *Robinson* [2011] EWCA Crim 916) grooming is not a term of art. It is an imprecise but convenient shorthand to refer to offending which involves the use of cynical and manipulative behaviour designed to achieve a sexual objective, frequently involving a breach of trust. The degree of culpability must be assessed not by reference to the generic term "grooming" but by reference to the individual components which make up the conduct, such as breach of trust, manipulation, persistence, the methods adopted, as well as the nature, severity and frequency of the abuse. As senior counsel for the respondent submitted, and as the court recognised in *HMA* v *Collins* (para 45; see also *R* v *Ali* [2015] Cr App R.33 paras 85 and 92) care must be taken to avoid double counting by treating both grooming and its individual components as separate aggravations.

[33] The term has been used by the court to describe a broad variety of offending, ranging from the most severe and egregious sexual offending against very young children (eg *HM Advocate* v *CB*) to cases where there has been, on the face of it, enthusiastic and willing participation by the complainer (eg *NP* v *HM Advocate*). Further examples of Scottish cases where there was grooming behaviour are *HM Advocate* v *JB* 2012 JC194, *DS* v *HM Advocate* 2017 SCCR 129, *JW* v *HM Advocate* 2018 SCCR 74, and *Kelly* v *HM Advocate* 2018 SCCR 104.

[34] What is obvious from the cases cited above, however, is that grooming usually consists of a pattern of manipulative behaviour which exhibits a number of very common features or hallmarks. For example:

(i) It is a common theme in cases of grooming for victims to be in a vulnerable position. The vulnerability may simply arise from the victim's age and stage of development. Whilst younger children may be particularly vulnerable, older children as they mature and explore their own identities may be susceptible to sexual grooming in the manner seen in *NP, R* v *Hubbard* [2002] 2 Cr App R (S) 101 and *R* v *MacNicol* [2004] 2 Cr App R (S) 2, where their youth and sexual inexperience is taken advantage of by those who are in a position of trust or authority. Young people who might not otherwise be particularly vulnerable but are pubescent and coming to terms with their sexuality are often targets of grooming.

(ii) Typically, the offending manifests as a course of conduct. The court will be less likely to accept that a sexual offence is aggravated by an element of grooming where the offending takes place spontaneously.

(iii) The offending will often follow a pattern of escalation. The offending may begin by small gestures of perceived kindness (such as lifts home, gifts or compliments) or by communications that seem, on the face of it, relatively innocent, but which then start probing into the victim's personal life and, later, sex life. Perpetrators will often try to escalate the intensity of the relationship by forming, strengthening and misusing a bond of trust. In cases of physical sexual abuse, the abuse will often begin with less invasive sexual offending such as kissing and touching. It will often escalate to more serious behaviours such as penetrative actions and, in the most serious of cases, sexual intercourse.

(iv) The use of emotional manipulation techniques by perpetrators against victims is common. The emotional dependency which has been engendered in the victim may be

utilised to continue the abuse, and to make the victim afraid that what they may wrongly perceive as emotional support may be withdrawn. Perpetrators may make their victims feel guilty or that they are somewhat responsible for what has happened. Perpetrators will often tell their victims that they, the perpetrator, will get into trouble or go to prison should anyone find out about the offending. Perpetrators may also use manipulation techniques to engineer a scenario where it is very difficult for their victims to leave or stop submitting themselves to the abuse. Frequently the perpetrator's manipulation techniques are used to distort the victim's perception and encourage them to engage in criminal activity. As a result the victim may perceive their compliance as consent in circumstances where consent may not have been freely given.

(v) In almost all cases there is an element of secrecy which is employed and enforced by the perpetrator. Perpetrators often tell their victims that they must not tell anyone about the offending. The sexual offending itself takes place in private, and often unconventional places where their activities are unlikely to be detected. This could be in a car, in secluded areas such as woodland or in places far from where the perpetrator and the victim reside.

(vi) The behaviour is often planned and systematic, and may involve a lengthy process.

(vii) In very many cases there will be a breach of trust by someone in a position of authority or responsibility towards the child, such as a coach, teacher, relative, close family friend or clergyman.

[35] Grooming can affect the perceptions of the groomed. This issue was clearly articulated in *R* v *Taylor* at paragraph 30:

> "The important point, in cases such as this, is that even a clear and unequivocal assertion of willing consent by a complainant may have to be seen in the context of other evidence, and surrounding circumstances, which may cause the jury to conclude that the assertion is an unreliable guide to what was actually happening. It must be remembered that the conduct of an abuser may cause his victim not merely

> to acquiesce but also to perceive her own acquiescence as consent. Conduct which may be described as grooming, or analogous to grooming, is after all intended so to distort the victim's perception as to encourage her to engage in sexual activity which is inappropriate and wrong."

In similar vein, in *R* v *Ali* Fulford, LJ, noted (para 57) that:

> "One of the consequences when vulnerable people are groomed for sexual exploitation is that compliance can mask the lack of true consent on the part of the victim."

He went on to state (paras 58 and 63):

> "Although … grooming does not necessarily vitiate consent, it starkly raises the possibility that a vulnerable or immature individual may have been placed in a position in which he or she is led merely to acquiesce rather than to give proper or real consent. One of the consequences of grooming is that it has a tendency to limit or subvert the alleged victim's capacity to make free decisions, and it creates the risk that he or she simply submitted because of the environment of dependency created by those responsible for treating the alleged victim in this way. Indeed, the individual may have been manipulated to the extent that he or she is unaware of, or confused about, the distinction between acquiescence and genuine agreement at the time the incident occurred.
>
> […]
>
> Although SS gave evidence which, at face value, appeared to indicate that she had consented, as the judge observed this needed to be viewed in the context of her account of her meeting Ali, the way he treated her, how often they met, her consumption of alcohol, and the particular events that led to sex between them on the first occasion."

[36] In cases where there is perceived consent on the part of an older child, and even, as put by the court in *R* v *Taylor,* where they appear to be an enthusiastic participant in what has taken place, care should be taken to assess all of the facts and circumstances surrounding the offending. It is now recognised that a jury may conclude that the free agreement required for true consent is not present where vulnerabilities of the victim are taken advantage of. Factors such as (i) a significant age gap, (ii) a disparity in positions of power/authority/trust, (iii) other vulnerabilities of the victim for example due to chaotic

lifestyles or difficult family relationships, (iv) the sexual inexperience of the victim, (v) the nature and pattern of the perpetrator's conduct towards the victim before sexual activity occurred, (vi) evidence of premeditation on the part of the perpetrator, (vii) evidence that the perpetrator used manipulation techniques towards the victim, (viii) evidence that the perpetrator exerted influence over the victim, (ix) the overall character, nature and persona of the victim, including their level of understanding and knowledge of the position they were in and the significance of what they were being asked to do should all be properly explored and taken into account when determining whether free agreement has truly been given.

The present case

[37] In our view the trial judge erred in his categorisation of the respondent's conduct, and in his approach to the fact that LW had believed herself to be consenting. He also erred in failing to treat the respondent as a groomer. Further, he erroneously considered that the respondent did not fall to be treated as someone with a particular and specific sexual interest in children.

[38] By their verdict the jury plainly accepted that consent had not been freely given. Nevertheless, in his appeal report the judge describes LW as having "participated willingly and enthusiastically in [the sexual conduct] and had enjoyed it". This does not, it seems, reflect anything which was actually said by her in any part of her evidence, and instead reflects a conclusion drawn by the judge from the sexualised, and apparently encouraging, nature of certain messages sent by LW in response to messages from the respondent. The judge stated that he did not regard these features as specifically mitigatory, but it seems clear that he treated them as such, because he went on to say (para 19 of his appeal report):

> "Nonetheless, it seemed to me that the subjective experience of the victim in this particular case was so radically different to the ordinary experience of victims of the sections 1, 2 and 3 offences as to make reference to what might be regarded as a typical or normal sentence for those offences at least unhelpful and potentially positively misleading. LW had considered, and continued to consider, that what had happened between her and [the respondent] was the expression of her bodily and sexual autonomy rather than a violation thereof, and the eventual stultification of that perception by the jury's verdict did not alter her contemporaneous subjective experience of the events in question, which was the antithesis of the experience of the vast majority of other victims of the section 1, 2 and 3 offences. It seemed to me that an appropriate sentence had to recognise that highly distinguishing feature of the case."

[39] At no point in her evidence did LW say she considered what had happened to be an expression of her bodily and sexual autonomy. That is a gloss by the judge on her evidence that at the time she believed she was consenting. The judge failed to recognise the pattern of grooming behaviour blatantly apparent from the evidence, and the way in which grooming can affect the perceptions of the groomed (see *R* v *Taylor* at paragraph 30).

[40] The judge's comment in his supplementary report that "A number of suggestions were made by the Crown as to why she might not have been freely consenting" is only partly correct. Those suggestions were not offered as stand-alone possibilities, but as an accumulation of factors which would allow the jury to conclude that the respondent had embarked upon a successful campaign of grooming of LW. The judge clearly understood this at the time, because his directions to the jury categorised the Crown approach as one involving inference from circumstantial evidence where "you look at the facts and circumstances, and the Advocate depute went through them all with you yesterday, this fact, that fact, taking them together do they persuade you beyond reasonable doubt that the apparent consent which she gave was not a real consent".

[41] The judge is wrong to suggest that the basis of the jury's verdict was not apparent and that it would be entirely speculative to attribute their finding that there was not free

agreement to a given cause. On the contrary, it may reasonably be inferred from their verdict that they accepted that LW's apparent consent was not real but rather the result of manipulation and grooming by the respondent. That was the only basis upon which they could have found there was not free agreement. It was the only basis upon which the Crown sought a conviction, and it is clear from the speeches that this was the central matter upon which the parties joined issue. This error by the judge led to him failing to take account of grooming as an aggravating factor.

[42] The offending against LW exhibited a great many of the hallmarks of "grooming." The respondent held a position of trust and authority over LW. He was some 35 years older than LW. He first contacted LW on social media in 2019 when, as he well knew, she was 12 or 13 years old. He appointed her captain of the football team, treated her more favourably within the team and at the very least must have contributed towards her award as "Player of the Year." He gained her trust by sending her messages which were, initially, innocuous. He moved on to paying her compliments, no doubt designed to make her feel special. When he first began to meet LW in person outside of football training, he would pick her up away from a location other than her home or football training and drive her to a secluded layby. Her involvement with him caused her to become dishonest towards her parents and friends. She turned off location services on her phone and lied to her parents about her whereabouts. When the offending escalated into physical sexual abuse, the respondent encouraged her to use pornographic websites. On around 8 - 10 occasions when he physically sexually abused LW, he took her to a secluded area and abused her in his car. The offending escalated, from kissing to full sexual intercourse, sexual touching and digital penetration and oral penile penetration. He did not wear a condom, even though they were readily available to him, and he ejaculated inside her so that she became concerned that she might become pregnant,

hence her use of contraceptive patches, and, later, a pregnancy test. He displayed no care or concern for LW's sexual health and wellbeing. He compounded the physical sexual abuse by sending sexually explicit messages and images to her. He manipulated her emotionally by telling her that he would go to prison should his abuse be discovered. When she was scouted for a better football team - a significant step-up for her - he used his position of power over her to make her feel guilty about leaving him and his team. He called her a liar and threatened to humiliate her in front of her teammates at football training. He told her that he could not trust her, which greatly upset her. To make matters worse, the respondent was a Child Protection Officer at the football club. In what may be interpreted as a degree of premeditation, the respondent sought advice from a child sexual abuse protection charity about the means and ways in which children were groomed and harmed online.

[43] The judge's conclusion that the respondent should not be seen as someone with a particular and specific sexual interest in children is insupportable on the evidence. Far from it being "futile to draw parallels" between the offences in charges 1 and 2 on the one hand and those in charges 3 and 4 on the other, knowledge of the entirety of the respondent's offending assists to illuminate its gravity. He has been convicted of sex offences against two, completely unrelated, older children (albeit one is imaginary), one of whom he began grooming from the age of 12 or 13. Within three months of being granted bail in respect of serious charges involving LW, he began his pursuit online of a person he believed to be another young girl aged 14, presenting herself as immature and extremely inexperienced in adult relationships. The offending followed a recognisable grooming pattern starting with relatively innocuous messages, then moving to more sexualised territory, asking about "Scarlet's" sexual experience. He began to use possessive terms to describe her. As with LW, he acknowledged to "Scarlet" that he knew what he was doing was wrong, but persisted

anyway. That the respondent has a specific sexual interest in underage females is an irresistible inference.

[44] Had the judge taken appropriate account of all of the factors which he should have, he ought to have imposed a significantly higher sentence for charge 2. We are also satisfied that the effect of his making the sentences for charges 3 and 4 concurrent with the sentences for charges 1 and 2 was that charges 3 and 4 were indeed committed "for free" (*McDade* v *HM Advocate*). The sentence imposed by the trial judge on charge 2 does not recognise the serious nature of the offending, for which there are no material mitigating factors. It does not reflect the presence of significant degrees of manipulation and grooming. It was unduly lenient and a different sentence should have been passed. It was also unduly lenient to make the sentences for charges 3 and 4 concurrent with the sentences for charges 1 and 2. The offending in charges 3 and 4 was separate from that in charges 1 and 2. It also indicated the persistent nature of his sexual interest in underage girls.

[45] In *Collins*, Lord Brodie, delivering the opinion of the court, stated (para 41) that:

> "For offences involving the rape of a complainer, or other penetrative sexual abuse of several complainers, in respect of whom the offender was in a position of trust or authority, headline sentences in the region of eight to ten years may be appropriate […]. The breach of trust involved, the duration of the offending, and the number of victims may, however, be such as to warrant a headline sentence in excess of ten years […]. Such cases would include, but are not limited to, the offender having committed the offences whilst being employed as a teacher, social worker, care worker or his having held any other position of authority within an institutional and/or educational setting."

[46] We consider it appropriate to impose a *cumulo* sentence for charges 1, 2, 3 and 4. In our view the respondent's criminality was grave, but it was not quite as grave as that of the appellant in *Collins* v *HM Advocate* where a *cumulo* sentence of 10 years' imprisonment was imposed. We consider that the appropriate *cumulo* sentence here is an extended sentence of 12 years, made up of a custodial term of 9 years with an extension period of 3 years.

Carrying out the exercise described in *HM Advocate* v *Fergusson,* had charges 1 and 2 been the only offences an appropriate sentence for them would have been a *cumulo* sentence - an extended sentence of 11 years made up of a custodial term of 8 years and an extension period of 3 years. Had charges 3 and 4 been the only offences an appropriate sentence would have been a *cumulo* sentence of 18 months imprisonment. However, mindful of the totality principle, and recognising that a total custodial term of 9 years 6 months would be excessive, we have restricted the custodial term to 9 years.

[47] In arriving at our *cumulo* sentence, and in carrying out the *Fergusson* exercise, we have taken due account of the utilitarian value of the respondent's pre-trial offer to plead guilty to charges 3 and 4. However, like the trial judge, we consider that there was no utilitarian value in the plea which was offered in respect of charges 1 and 2.

Disposal

[48] We shall allow the appeal, quash the sentences which the judge imposed on charges 1 to 4, and substitute a *cumulo* extended sentence of 12 years, made up of a custodial term of 9 years and an extension period of 3 years. As before, that sentence runs from 3 November 2022.

[49] For the avoidance of any doubt, we have not quashed the non-harassment order which the judge made when he passed sentence. That order remains in place.