APPEAL COURT, HIGH COURT OF JUSTICIARY

[2024] HCJAC 41
HCA/2024/359/XC

Lord Doherty
Lord Matthews
Lord Armstrong

OPINION OF THE COURT

delivered by LORD DOHERTY

in

Crown Appeal against Sentence

by

HIS MAJESTY'S ADVOCATE

Appellant

against

RMG

Respondent

Appellant: P Harvey AD; Crown Agent
Respondent: D Findlay KC, V Young; John Pryde & Co (for Russells Gibson McCaffrey)

25 October 2024

Introduction

[1] The respondent is now aged 64. He was convicted after trial of 17 charges. Three of them (charges 14, 16 and 17) were assaults for which he was admonished. It is unnecessary to say more about those offences because the sentences in respect of them have not been appealed. This Crown appeal concerns the sentences imposed for the remaining 14 charges.

[2] Charges 1 to 6 were sexual offences committed against three of the respondent's younger cousins. Charges 1 to 3 involved the same boy, U. Charge 4 involved a female, V. Charges 5 and 6 related to another female, W.

[3] Charge 1 concerned lewd, libidinous and indecent practices and behaviour on one occasion when U was aged 10 or 11. U had been asleep. The respondent woke him and asked if he would suck his penis for 20 pence. U agreed because 20 pence was a lot of money to him. The respondent put his penis into U's mouth. The incident finished when a noise was heard elsewhere in the house. U asked for the 20 pence but the respondent said he did not have any money. When U was 10 or 11 the respondent was aged between 18 and 20.

[4] Charge 2 involved lewd, libidinous and indecent practices and behaviour on an occasion when U was aged between 10 and 12. U was having a bath. The respondent was also naked and was washing U. The respondent told U that he wanted to put his penis into U's mouth. U got out of the bath and moved to the living room. The respondent's penis was erect. U did not understand what was happening. The respondent placed his penis in U's mouth with one hand and placed his other hand on U's head. He ejaculated into U's mouth. The respondent was aged between 18 and 21 at the time.

[5] Charge 3 involved an indecent assault when U was aged between 10 and 12 and the respondent was aged between 18 and 21. They were watching a film. They were in the same bed and both were naked. U was lying on his side and the respondent was behind him. The respondent became aroused at the film and put his penis into U's anus. There was no warning of that before it happened. U screamed. The respondent's penis came out. He was angry and slapped U to the face with his hand. That caused bruising. The respondent told U to say they had been play fighting.

[6] Charge 4 involved lewd, indecent and libidinous practices and behaviour on repeated occasions towards V while she was aged 14 and 15, contrary to section 5 of the Sexual Offences (Scotland) Act 1976. The respondent was aged between 19 and 21 at the relevant times. V spoke to being assaulted when she and the respondent were alone in the house. He encouraged her to go to his room or into another bedroom. He suggested to her that they do things which she now knew were foreplay but she was too young to know that at the time. The respondent touched her clitoris and put his head down to her vagina. He told her what to do, including taking hold of his penis and rubbing it up and down. He put his penis into her mouth and moved her head up and down. He said it was like a lollipop and that she should suck it. He put his hand on her head. He ejaculated into her mouth. Something sexual happened to her almost every week. It became so routine that she thought it was normal.

[7] Charges 5 and 6 involved rapes of W.

[8] W's evidence about charge 5 was that when she was 13 and visiting her aunt's house the respondent grabbed her wrist and dragged her into a bedroom. He took her jogging bottoms off. He pushed her onto the bed and removed her pants. He used a dishcloth or tea towel to tie her hands behind her back. He penetrated her vagina with his fingers. He took his trousers down, lay on top of her and penetrated her vagina with his penis. He told her to keep her mouth shut or he was going to kill her family. He turned her over and put his penis in her anus. Afterwards her vagina was bleeding and there was some blood from her anus. She also had some bruising to her wrist. When W was 13 the respondent would have been 19 or 20.

[9] W's evidence about charge 6 was that the respondent pushed her on to a sofa. He lifted her skirt, took her pants down, and unzipped his trousers. He put a tea towel or a

dishcloth in her mouth. She was unable to speak because of that. He lowered his boxer shorts and put his penis inside her vagina. Then he turned her over and placed his penis in her anus. He removed it without ejaculating. Afterwards she had bleeding from her vagina. The trial judge does not narrate in his report the evidence as to W's age at the time of this offence, beyond saying that both this incident and that in charge 5 "related to her childhood". However, the latitude of charge 5 extended from W's 13th birthday until less than 6 weeks before her 17th birthday. The respondent would have been aged between 19 and 23 at that time.

[10] Charges 7, 8 and 9 all concerned the respondent's wife X.

[11] Charge 7 was of assault to injury on various occasions between 1980 and 1984 when the respondent was aged between 19 and 23. X was about 2 years younger than the respondent. He punched and kicked her to the face and body and pulled her by the hair. Her knees and body were bruised. This had happened every couple of weeks. She crouched down in a ball to protect her face. After he was violent he often apologised and said that it would not happen again. She did not leave him because she was scared of him. There seemed to be no trigger for his behaviour. He took his anger out on her. On one occasion he placed a large kitchen knife against her throat. The blade of the knife cut her pinkie. Her infant son was on her knee and was screaming and X was crying.

[12] Charge 8 involved an assault to injury in 1981 when X was pregnant. The respondent was aged 20 at the time. They had been out and had argued. X had tried to run away from him but he pursued her, grabbed her by the arm, and pulled her towards their home. Once there he threw her onto a bed settee and punched her hard on the back. She asked him to stop but he punched her 10 to 20 times. She awoke later that night in pain.

[13] Charge 9 involved a rape in 1984 when X was 8 months pregnant. The respondent was aged 24. They had both gone to bed for the night. The respondent wanted to have sex but X kept saying no. He tore her pants off, forced himself on her, and placed his penis into her vagina. She said "Stop. Stop." but he just carried on. He was inside her for about 5 minutes when he ejaculated. She was crying at the time.

[14] Charges 10, 11, 12 and 13 involved assaults on Y, who was the respondent's partner at the time of charge 11 and part of the period covered by charge 10; and she was his wife during the reminder of the period covered by charge 10 and at the times of charges 12 and 13.

[15] Charge 10 involved assaults to injury on numerous occasions over a period of 16 years between 1985 and 2001 when the respondent was aged between 25 and 41. The first assault happened a couple of months after they began their relationship. They had argued. The respondent pinned Y to the wall, putting his hands around her neck and pushing her against the wall. He also pinned her to the floor. He shouted at her. He was violent towards her on numerous occasions after that. On one of those occasions he lost his temper and slapped her face while she had a baby in her arms. On another occasion he assaulted her by poking a finger into her eye. He head-butted her forehead a few days before they got married. On another occasion he threw a screwdriver at her, striking her on the body. On a further occasion he threw a mug at her. Y's evidence was that he punched her each week. Sometimes he would push or slap her for small things, such as if she did not agree with him or had folded his clothes incorrectly. She remembered having quite a few black eyes and bruises.

[16] Charge 11 involved an assault to injury in 1987 when the respondent was aged 26 or 27. He attacked Y by punching her and hitting her. She fell to the floor. He continued to

hit her whilst she was on the floor. He kicked her "like a football" on her legs, stomach and thigh. She managed to get up. She punched him in the face and slapped him. He dragged her by the hair from the kitchen into the bathroom. He leaned her over the bath and held a kitchen knife to her face, saying "I'm not going to have you bleeding all over the place". He put the knife into the corners her mouth, causing a small amount of bleeding. He then pulled her back from the bath and threw her down "like a piece of rubbish".

[17] Charge 12 involved an assault to injury in 1991 when the respondent was 30 or 31. Y was pregnant. He punched her eye, giving her a black eye.

[18] Charge 13 involved an assault to injury. The respondent had been shouting at Y. She fled from the house but he pursued her. He caught her and put her in a bear hug, then grabbed her by the arm. She bit his thumb in an attempt to break free. He bit her ear causing it to bleed. It was painful. He said "I'm sorry. I did not mean to. But you hit me".

[19] Charge 15 related to an assault to injury of the respondent's daughter Z when she was aged 7 or 8 and the respondent was about 33 or 34. He punched her in the abdomen, as a result of which she could not catch her breath. Her mother took her to hospital to be checked over.

[20] At the trial the respondent denied all of the sexual offending. He accepted responsibility for some, but not all, of the physical assaults. After conviction he persisted in denying sexual offending and he continued to minimise his violent non-sexual offending. His only previous conviction had been in 1979, a summary conviction for theft for which he was sentenced to 60 days' detention. The plea in mitigation highlighted the lack of analogous previous convictions; the fact that the sexual offences were said to have been committed 40 to 45 years ago; and that more than 20 years had passed since the last violent offence. He had been in a stable relationship with his current partner, who stood by him, for

19 years; and he had held down a responsible job up to the date of his remand. He suffers from ill-health, namely heart disease (for which he takes medication) and chronic obstructive pulmonary disease (for which he uses an inhaler when required). Neither of those conditions had prevented him from working.

[21] The judge sentenced the respondent to an *in cumulo* sentence of 8 years' imprisonment for the sexual offences (charges 1, 2, 3, 4, 5, 6 and 9) backdated to 23 May 2024. He also sentenced him to an *in cumulo* sentence of 3 years' imprisonment for charges 7, 8, 10, 11, 12, 13 and 15, which sentence he made concurrent to the 8 year sentence.

[22] The Crown appeals on the ground that the sentences are unduly lenient.

The appeal report

[23] In his report the judge explained:

> "[108] … I do not accept that I 'gave the impression that' [the respondent] had committed the offences 'for free' as is suggested at paragraph 14 of the Note of Appeal. These were discrete - non-sexual - parts of his course of conduct/abuse and treated by me as such.
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> …
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> [111] … I accepted what I had heard from senior counsel in submission namely that [the respondent's] circumstances had changed. The last of these offences had occurred over 20 years ago. There was nothing in the criminal justice social work report, his 1979 conviction for theft or in the case before me which indicated that [the respondent] had more recent offending. While it is true that he denied the major aspects of his offending, the sentence imposed (8 years) in part reflected the age of the accused when his initial offending occurred (18 at the initial timeframe in charges 1, 2 and 3; aged 20 in charges 4, 5, 6 and 7; aged 21 at the start of charge 8 but 63 at the time of sentence).
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> [112] I took into account what was said on page 10 of the CJSWR that '[The respondent's] final risk category for sexual reconviction is of Low Risk…'
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> [113] Here his offending seems to have been within a familial setting, over 20 years ago in circumstances where, at sentence, he had been married for 19 years and had been in stable employment for 25…

…

[115] Reflecting on the above factors a determinative custodial sentence of 8 years seemed fair and proportionate while having regard to the gravity of his sustained offending and to the consequences to the complainers while also reflecting the age of the offences, the age then and now of the accused, his lack of record and his current risk.

[116] I had considered ordering that the 4 (sic) years sentence imposed in respect of charges 7, 8, 10, 11, 12, 13 and 14 (sic) be served consecutively but decided against doing so. I took the view that the accused's behaviour (sexual and non-sexual) towards his family was a course of conduct and that to order a consecutive sentence may have been disproportionate.

[117] Before closing, I should mention that I have read the draft sentencing guidelines promulgated in July 2024 and the Crown appeal in *HMA* v *AP* [2024] HCJAC 31.

[118] In *AP* a sentence of 5 years was increased to 8 in a case which, *it seems*, had involved a younger respondent at the time of sentence (I do not see that his age is specified); the respondent there had been convicted of two rapes and a sexual assault; the respondent was assessed as being at a medium risk of reoffending; one of the rapes was committed while on bail; each charge had an aggravation in terms of section 1 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016 and the respondent had a prior conviction for domestic abuse.

[119] Having regard to the factors outlined at paras [96] to [116] above, [the respondent's] lack of record, [his] age on release and his obligation to comply with the notification requirements for the rest of his life, I imposed a measured sentence intended to fulfil sentencing purposes to include the protection of the public, punishment, rehabilitation and society's disapproval of this sexual and non-sexual domestic offending."

Submissions for the Crown

[24] The 8 year sentence for the sexual offences was unduly lenient. Charges 1 to 6 all involved penile penetration against children or, possibly in relation to charge 6, against a female who was 16. Charge 4 was particularly serious because there was almost weekly oral penetration over a period of about 2 years. In charge 5 the complainer had been threatened, and in both that charge and charge 6 significant force had been used. In each of these six

charges the respondent had, as an older relative, been at least to some degree in a position of trust. Reference was made to *HM Advocate* v *Collins* 2017 JC 99, paras [41] - [42]. The victim statements from U and V both indicated that they had suffered serious emotional and psychological consequences. The rape of X had been aggravated because of her pregnancy at the time. The judge had not followed the approach outlined in *HM Advocate* v *Fergusson* 2024 SLT 573. An *in cumulo* sentence for charges 1 to 6 and charge 9 ought to have been significantly higher than 8 years, even allowing for the respondent's youth at the time of their commission, his ill-health, and his pro-social life for more than 20 years.

[25] The 3-year sentence for the assaults of his partners and the assault of his daughter was also unduly lenient. While the assaults were all to injury with none of them causing severe injury, the partner assaults were sustained courses of domestic abuse covering a period of about 20 years. Attacks were frequent. On two occasions a knife was pressed against the victim. The violence included punching, biting, kicking, head-butting, hair pulling, eye poking, and compressing of the throat. The victims were pregnant at the times of the assaults in charges 8 and 12. The victim statements from X and Y pointed to serious emotional and psychological effects, and Y also attributed her fibromyalgia to the trauma she suffered. The sentence had been made concurrent with the result that there was in fact no punishment for these offences. In that regard the judge had committed the error identified in *McDade* v *HM Advocate* 1997 SCCR 52 at page 54.

Submissions for the defence

[26] The sentences may have been lenient, but they were not unduly so. Charges 1 to 9 had been committed 40 years or more ago when the respondent had been a very young man. The last of the offending in the remaining charges had ceased more than 20 years ago. The

respondent's life divided into three distinct aspects, viz. (i) a young man; (ii) a mature man; (iii) the man who went on trial. The respondent now was a very different man from the man he had been at the times of the offences. He had led a settled life. He was in a stable relationship with a long-term partner. He had held down responsible employment for decades. He had changed his life. He presented a low risk of offending. The judge had the advantage of hearing all of the evidence. He took all relevant considerations into account. He was entitled to make the sentence for the assaults concurrent to the sentence for the sexual offences. In effect, he considered that in the whole circumstances 8 years was an appropriate *in cumulo* sentence for all of the offending.

Decision and reasons

[27] The sentencing judge did not carry out an exercise of the sort outlined by the court in *HM Advocate* v *Fergusson* at paras [23] - [25]. He ought to have done. We are in no doubt that if he had it would have been apparent to him that the totality of the sentences was unduly lenient.

[28] We do not agree with the judge's reasons for making the sentence for charges 7, 8, 10, 11, 12, 13 and 15 concurrent with the sentence for the sexual offences. The offending did not represent a single course of conduct. Many of the offences related to a later period than the sexual offences, and they also involved further complainers, Y and Z. In those circumstances we do not accept that it would be disproportionate to impose an additional period of imprisonment for the non-sexual offences. The effect of making the sentence for them a concurrent one was indeed that those offences were committed "for free" (*McDade* v *HM Advocate*, page 54).

[29] Of course, if a sentence is made consecutive to another sentence, the sentencing judge must ensure that the totality of the sentences is not excessive. That is a factor which they should take into account when they decide the length of those sentences. It may make the imposition of an *in cumulo* sentence for all offences the most appropriate disposal. It was common ground that an *in cumulo* sentence for all of the offences would have been suitable here. We agree.

[30] The sentencing judge made reference to the case of *HM Advocate* v *AP* [2024] HCJAC 31, we think in order to support his conclusion that 8 years was an appropriate sentence for all of the sexual offences. He assumed – correctly - that at the time of sentencing the respondent in that case was younger than the respondent here. He was in his late 30s. However, the sexual offending here was a good deal more extensive than in *AP*, making a longer sentence for it appropriate. Due account also has to be taken of the sustained violent offending in the present case. These factors indicate that an *in cumulo* sentence requires to be significantly higher than the 8 years passed in *AP*.

[31] Following the approach suggested in *Fergusson*, we consider that an appropriate *in cumulo* sentence for charges 1, 2, 3 and 4 would have been 6 years' imprisonment. In reaching that view we have regard to the serious nature of the conduct, the young ages of the complainers, and all of the other circumstances of the offences, including that there was financial inducement in charge 1, violence was used in charge 3, the repeated offending in charge 4, and the serious consequences discussed in the victim statements. While the respondent was not in a position of authority over U, V or W at the relevant times, he was a good deal older than them and he took opportunities to abuse them on occasions when, because of family circumstances, they were together. On the other hand, we have regard to the fact that the maximum sentence for charge 4 is 2 years' imprisonment. That is the

sentence we would have imposed on that charge had it stood alone. We also take account of the respondent's youth and immaturity at the time of these offences, his current age and ill-health, and his pro-social life for at least two decades prior to his remand.

[32] We turn to charges 5, 6 and 9. W was raped twice. Significant force was used, and there was some vaginal and anal bleeding. X was raped once. She was pregnant at the time. There have been serious emotional and psychological consequences for both women. The respondent was 19 or 20 at the time of charge 5, 19 to 23 at the time of charge 6, and 23 or 24 at the time of charge 9. He was relatively young and immature. Once again we take account of his current age and ill-health and his pro-social life latterly. Had we been sentencing for these three offences alone the sentence would have been lower than the sentences in *HM Advocate* v *RM* 2024 JC 181 (where the custodial term of an extended sentence was 10 years) and *HM Advocate* v *CM* [2024] HJAC 39 (9 years). In our view an appropriate sentence would have been 8 years' imprisonment.

[33] That brings us to the non-sexual charges. While there was no severe injury, in some cases there was significant injury. The assaults were violent and frequent. They occurred over a period of about 20 years. For most of that time the respondent was a fully mature adult. There have been serious consequences for X, Y and Z. We take account of the respondent's current age and ill-health and his pro-social life since these offences. Had we been sentencing for these offences alone an appropriate sentence would have been 4 years' imprisonment.

[34] The cumulative total of those sentences is 18 years' imprisonment. That would be an excessive sentence. Application of the totality principle points to a significantly lower sentence being appropriate. We consider that an *in cumulo* sentence of 12 years' imprisonment is fair and proportionate.

[35] We shall allow the appeal, quash the sentences which the judge imposed, and substitute an *in cumulo* sentence of 12 years' imprisonment. As before, that sentence is backdated to 21 May 2024.